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STATE and LOCAL NOISE ENFORCEMENT LEGAL MEMORANDA

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OFFICE OF NOISE ABATEMENT AND CONTROL
NOISE AND RADIATION ENFORCEMENT DIVISION
U.S. ENVIRONMENTAL PROTECTION AGENCY
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The legal memoranda included in this document address some of the more prevalent enforcement issues which have arisen in connection with State and local noise control activities. This collection of legal memoranda is organized according to the following two distinct phases of noise control activities: (1) ordinance drafting; (2) prosecution.

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STATE AND LOCAL NOISE ENFORCEMENT LEGAL MEMORANDA

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Washington, D.C.

PREFACE

> Existing or proposed noise control programs encounter a variety of problems at the local level. An inventory of Soundings [a journal of press coverage of noise control activities], prepared for the U.S. Environmental Protection Agency, Office of Noise Abatement and Control, suggests a general classification in nine problem areas. These nine problem areas ... relate to the ordinance, enforcement and litigation. The most common problems are associated with the ordinance, ranging from vagueness which makes interpretation and enforcement difficult, to restrictiveness, which causes an undue burden on the offender.
>
> "Environmental Noise Control Programs in the United States", Clifford R. Bragdon, Sound and Vibration, December 1977.

The legal memoranda included in this collection of "Legal Memoranda for State and Local Noise Enforcement" address some of the more prevalent enforcement issues which have arisen in connection with State and local noise control activities. This collection of legal memoranda is organized according to the following two distinct phases of noise control activities: (1) ordinance drafting; and (2) prosecution. It is our hope that this collection of legal memoranda will help State and local agencies avoid or solve noise enforcement problems which have thwarted noise abatement efforts in the past.

The primary research for these memoranda was conducted by the following law students: Carolyn Marsh, Nancy Finkbeiner, Mary Berry, and Kevin Smith. Substantial organizational and analytical assistance was provided by Kathy L. Summerlee and John S. Winder, Jr. Organizational and editorial responsibility for these memoranda is accepted by the undersigned.

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SUMMARY

LEGAL-ENFORCEMENT ISSUES IN COMMUNITY NOISE CONTROL

I. SOURCES OF STATE AND LOCAL AUTHORITY TO CONTROL NOISE

The states possess inherent power to regulate noise under two basic sources of authority: police power and the Tenth Amendment of the U.S. Constitution. The police power of a State derives from a grant of power by the people in a given state to the state government to regulate the health and welfare of citizens within its jurisdiction and to provide for the public convenience and public good. This power has traditionally belonged to the states and was not surrendered by them to the federal government upon adoption of the Constitution. The only historic limitation upon police power is that it must not be inconsistent with provisions of the State or Federal constitutions.

The Tenth Amendment of the United States Constitution, which provides, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people," grants an additional basis of authority for state legislation. U.S. CONST. Amend X.

Individual State constitutions may provide additional sources of state authority to regulate noise. Such constitutional provisions may allow a state to provide for the general welfare or protect the environment. For example,

> The people shall have the right to clean air and water, freedom from excessive and unnecessary noise,

> and the natural, scenic, historic and aesthetic qualities of their environment; and the protection of the people in their right to the conservation, development and utilization of the agricultural, mineral, forest, water, air and other natural resources is hereby declared to be a public purpose.
> The general court shall have the power to enact legislation necessary or expedient to protect such rights.
>
> MASS. CONST. art. 49 (1972).

States may, in turn, confer upon local governments the authority to enact or enforce local programs and policies. For example, a substantial majority of State constitutions include home rule provisions which confer generous local powers of legislative and administrative initiative. Following are the two basic types of home rule provisions:

(1) home rule flows directly from the constitution:

> Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general law.
>
> OHIO CONST. art. XVIII §3 (1912).

(2) the State legislature is granted the power to grant home rule to local governments:

> . . . The legislative assembly shall provide by law for the establishment of home rule in cities and villages.
>
> N.D. CONST. art. VI (1966).

Even in the absence of broad home rule authority, local governments may have power to control noise through authority granted in specific enabling legislation. Many

States presently use this method to grant local authorities power to enact and enforce noise provisions. For example:

> Pursuant to this chapter, in order to protect the health, safety and welfare of its citizens, a city or county may adopt and enforce noise ordinances or noise standards otherwise permitted by law.
>
> OR. REV. STAT. §467.100 (1974).

II. NOISE CONTROL OPTIONS

A. Common Law Nuisance

The common law nuisance action has been the traditional legal tool for noise control at the State and local level. A nuisance is defined as "Annoyance; anything which . . . essentially interferes with enjoyment of life or property." Holton v. Northwestern Oil Co., 161 S.E. 391, 393 (1931). Nuisances are classified by courts as either public or private nuisances. A public nuisance is one that is common to the public generally. The test to determine whether a public nuisance exists is not based on the number of persons annoyed, but the possibility of annoyance to the public by invasion of its rights. See, Baltzeger v. Carolina Midland Ry. Co., 32 S.E. 358 (1899). A private nuisance, conversely, is an activity which interferes with the enjoyment of some private right of a single individual or identifiable number of persons. See, People v. Route 53 Drive-In, 358 N.E.2d 1298 (1976).

To determine whether an activity constitutes a private nuisance, the court conducts a balancing test -- weighing the value of the interfering activity with the rights and interests of the persons being affected. Typical factors which the court considers are the following: the character of the neighborhood, Jedneak v. Minneapolis General Elec. Co., 212 Minn. 226, 230, 4 N.W.2d 326, 327, 328, (1942); the nature of the thing complained of, Hofstetter v. Myers, Inc., 170 Kan. 564, 228 /p.2d 522 (1951); its proximity to those complaining, Hasslinger v. Village of Hartland, 234 Wis. 201, 290 N.W. 647, (1940); the frequency and continuity of its operation, Hofstetter, supra; the nature and extent of the harm done, Schott v. Appleton Brewery Co., 205 S.W.2d 917 (Mo.App.1947); whether or not there are any means of preventing it, Godard v. Babson-Dow Mfg. Co., 313 Mass. 280, 47 N.E.2d 303, (1943); whether or not the operation is conducted in the only feasible locality, Robinson v. Westman, 224 Minn. 105, 29 N.W.2d 1 (1947); the importance of the defendant's business to the community, Soukoup v. Republic Steel Corp. 78 Ohio App. 87, 66 N.E.2d 334, (1946); the amount of defendant's investment, City of San Antonio v. Camp Warnecke, 267 S.W.2d 468, (Tex.Civ.App.1954); the length of time his business has existed. Waschak v. Moffat, 173 Pa.Super. 209, 96 A.2d 163, (1953); reversed on other grounds, 379 Pa.441.109 A.2d 310, (1953).

Prosser, Torts, Nuisance §89 (4th Ed. 1971).

Excessive noise has been recognized as a common-law nuisance. For example:

> It is recognized in Michigan, as well as in other jurisdictions, that under certain circumstances noise may constitute a nuisance and may be enjoined...To render a noise a nuisance, it must be of such a character as to be of actual physical discomfort to persons of ordinary sensibilities...[C]onsideration should be given to such additional factors as the character of the industry complained of..., volume, time and duration of the noise, and all the facts and circumstances of the case.
>
> Smith v. Western Wayne County Conservation Ass'n, 158 N.W.2d 463, 468 (1968)

Traditional remedies for injured parties in nuisance suits are temporary or permanent injunctions and/or monetary damages. The determination of the appropriate remedy is based on the facts of the case, and is within the discretion of the court. For example, the Supreme Court of Connecticut awarded $3,500 to a citizen in a private nuisance action brought against neighbors who operated noisy air-conditioning equipment during night time hours. The court also enjoined the defendants from operating their equipment between the hours of 10 p.m. and 8 a.m. until the sound levels met permissible decibel levels. Nair v. Thaw, 242 A.2d 757, 759 (Conn. 1968).

One of the problems raised by the use of nuisance suits for noise control is that many major noise problems consist of several noise sources operating concurrently. In such a situation, it is difficult to identify the appropriate

defendant in a nuisance suit. Another difficulty in nuisance suits is that most critical noise problems affect the public generally, rather than specific individuals. For example, mass transit noise affects the general community. This makes it very difficult for the plaintiff to meet the burden of proof which requires a showing of damage distinguishable from that sustained by other members of the general public. Alexander v. Wilkes-Barre Anthracite Coal Co., 98 A 794 (1916). If noise results in annoyance to the entire community, class action suits on behalf of the public may be necessary to prove that the noise is a nuisance. Class action suits, however, present problems of joinder of parties, notification requirements and excessive cost.

Common law nuisance actions may be effective in communities which have not adopted noise control regulations. Such actions may also provide a remedy for individuals who are affected by noise sources outside the scope of State or local noise provisions.

B. Statutory Nuisance

Rather than relying solely on the common law, communities may wish to legislate, broadly or narrowly, against noise nuisances. For example, an ordinance may prohibit "excessive" or "loud or raucous" noise. Such statutory nuisance provisions, may be either the sole method of enforcement or part of a comprehensive noise control statute or ordinance. Three types of statutory nuisance provisions exist in noise

statutes and ordinances. The most general type of provision merely prohibits creation of a nuisance. For example:

> ... [A]ny person ... who shall own, lease, conduct ... any of the above enumerated acts ... is guilty of a nuisance.
>
> Mich Complied Laws 600.3801 (1963)

The second type of statutory nuisance provision specifically prohibits noises which interfere with the health and welfare of the public. For example:

> It is hereby declared to be the public policy of Fairfax County, in cooperation with Federal, State and local government and regional agencies, to promote an environment for its citizens free from noise that jeopardizes their health or welfare or degrades the quality of life...
>
> FAIRFAX, VIRGINIA CODE, Ch.16 A §16A.1.2 (1975)

The third type of statutory nuisance provision prohibits any noise disturbance. For example,

> No person shall unreasonably make, continue or cause to be made or continued any noise disturbance.
> Noise disturbance is defined as any sound which (a) endangers or injures the safety or health of humans or animals or (b) annoys or disturbs a reasonable person of normal sensitivities, or (c) endangers or injures personal or real property.
>
> NIMLO/EPA Model Noise Ordinance, Art. VI. §§6.1; 3.3.20 (1975)

Another type of statutory noise control statute is a "disturbing the peace" provision. For example,

> It shall be unlawful to knowingly and wilfully cause or create excessive or unnecessary noise by engaging in boisterous, noisy and loud conduct while on a public

> street, sidewalk or parkway so as to disturb the quiet, comfort and repose of persons.
>
> WEST PALM BEACH, FLA., CODE, Ch32A, §A-8 (1975)

State and local authority to enact and enforce disturbing the peace provisions flows from the traditional police power of the State to preserve the public peace and tranquility. However, often it is difficult to restrict the production of noises which are typical, common, or continuous as well as those not calculated to create a disturbance. Moreover, disturbing the peace provisions, like statutory nuisance provisions, may be subject to Constitutional challenges on the basis of the First, Fifth and Fourteenth Amendments.

C. Objective Noise Control Measures

Problems associated with nuisance actions may render statutory controls more appropriate tools for effective noise control. A State may amend its general laws to control a particular noise problem within the State. For example, in 1975 Wisconsin amended its general statutes to include a snowmobile law requiring all snowmobiles manufactured and sold after 1972 not to exceed established decibel levels. 1975 WIS. LAWS, Ch. 39. A State may also enact general environmental management acts which establish agencies responsible for the promulgation of noise control regulations. New Mexico has used this approach in its Environmental Improvement Act which specifically includes noise control as one of the areas to be regulated by the State's Environmental Improvement Agency. See, Ch. 277, Laws of 1971, NMSA.

Specific noise statutes and ordinances are legislative responses to noise problems at the State and local level which deal exclusively and comprehensively with noise and are tailored to the specific needs of the jurisdiction. These statutes and ordinances can be objective or subjective in nature, depending upon whether sound violations are defined in terms of quantitative or qualitative standards.

The objective nature of quantitiative standards arises from the use of measures of noise magnitudes in terms of decibel levels. These noise control regulations usually prescribe maximum permissible decibel levels for a given area or for specific noise sources. Some common types of State and local quantitative noise regulations are:

- product performance standards implemented through licensing or certification procedures;
- operational limitations, such as curfews;
- movement limitations, e.g., restrictions on truck traffic in noise sensitive areas such as hospital zones; and
- property line limitations, e.g., a maximum noise emission level at the property line in a residential, commercial or industrial zone

The use of quantitative standards in noise ordinances involves unique enforcement considerations. For example, decibel measurement requires special equipment and expertise. Consequently, quantitative measurements require additional enforcement costs for a community in purchasing equipment and training. Moreover, decibel measurements alone do not provide for variations in the frequency of the noise occurance -- a factor which greatly affects the annoyance level

of a given noise. To compensate for frequency variations, multiple readings of the noise source must be made, increasing the time and expertise necessary for measurement.

The major benefits of quantitative measurements are specificity and reliability. A community can designate permissible decibel levels for given categories of land use areas, products, uses and time of use. These decibel levels may be drawn as narrowly as required. For example, a community may designate broad land use classifications of residential, commercial and industrial zones or may break down land use categories into such narrow classifications as public, institutional, agricultural, open space, multiple dwelling, light commerical, business and heavy industrial zones. The specificity of quantitative standards also enables these ordinances to survive Constitutional challenges on the basis of First Amendment Freedom of Speech and Fifth Amendment Due Process Vagueness. (see discussion on First and Fifth Amendments, following). In addition, reliability of permanent records of noise incidents is greatly increased with quantitative measurement. Recording the sound emitted from a noise source provides concrete evidence to prove violations of noise regulations, thus there is no dependence upon subjective definitions and subjective testimony of noise enforcement agents, police or witnesses to prove that noise violations have occurred.

III. CONSTITUTIONAL ISSUES

A. FEDERAL PREEMPTION (ARTICLE VI - SUPREMACY CLAUSE)

The Supremacy Clause of the United States Constitution provides that:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.
>
> U.S. CONST. art. 6, §2.

The Supreme Court has recognized since 1824 that frequently the States and the Federal government have concurrent rights to regulate in a specific field, but that when Congress has definitively spoken in a given area inconsistent State legislation must give way. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 6 L.Ed.2d 23 (1824). The doctrine of Federal preemption, predicated on the Supremacy Clause, provides that where there is a discernable conflict between Federal law and State legislation, Federal law prevails. However, Federal and State conflict is not always clear-cut. There are many judicial tests which may be applied to determine whether a Federal-State conflict requiring a finding of Federal preemption exists; irreconcilable conflict, potential conflict, interference by State regulation, occupation of the field by Federal government and need for national uniformity in the field of regulation. In applying these tests, courts view the existing Federal

legislation in a given area, and determine what, if any, State regulation is permissible.

Pursuant to its constitutional authority to regulate interstate and foreign commerce under Article I, Section 8, Congress passed the Noise Control Act of 1972 (NCA). Although the NCA states that "primary responsibility for control of noise rests with the State and local governments," NCA, 42 USC §4901, the Act also specifically authorizes primary Federal regulation of four major noise sources: aircraft, interstate railroads, interstate motor carriers and new products. This Federal noise control activity, however, does not totally preclude related State and local controls. Drafters of noise regulations should consider the permissible extent of State and local regulation and federal preemption in each of these four areas.

1. Aircraft Regulation

The NCA delegates primary authority to the Federal Aviation Administration to adopt and enforce noise standards for aircraft. Section 7(b) of the NCA amends the Federal Aviation Act of 1958 in part as follows:

> the FAA...shall prescribe ... and amend such regulations as the FAA may find necessary to provide for the control and abatement of aircraft noise and sonic boom, including the application of such standards and regulations in the issuance, amendment, modification, suspension, or revocation of any certificate authorized by this title. 42 USC §4906.

Although there is no explicit preemption in section 7, many courts have adopted the position that State and

local governments have limited authority to control aircraft noise. In City of Burbank v. Lockheed Air Terminal, 411 U.S. 624 (1972), a local ordinance imposing a curfew on jet operations at a private airport was declared invalid as infringing on a Federally preempted area:

> Control of noise is of course deep-seated in the police power of the States. Yet the pervasive control vested in EPA and FAA under the 1972 Act seems to us to leave no room for local curfews or other local controls...
>
> If we were to uphold the Burbank ordinance and a significant number of municipalities followed suit, it is obvious that fractionalized control of the timing of take-offs and landings would severely limit the flexibility of FAA in controlling air traffic flow. City of Burbank at 639.

The authority of State and local governments to control noise as proprietors of public airports may be less restricted. Proprietors are liable for aircraft noise damages resulting from operations of their airports under the Fifth Amendment Due Process requirement that governmental bodies give just compensation for property taken for public purposes. Griggs v. Allegheny County, 369 U.S. 84 (1962). Further, the Senate Report of the Noise Control Act suggests that public operators of airports do have authority to control noise:

> the Federal government is in no position to require an airport to accept service by noisier aircraft and for that purpose to obtain additional noise easements. The proposed legislation is not designated to do this and will not prevent airport proprietors from excluding any aircraft on the basis of noise considerations. Senate Report

No. 1353, 90th Cong. 2d Sess. 6-7 (1968).

At least one U.S. District Court has recognized this proprietary authority of local governments to control noise at public airports. In National Aviation v. City of Hayward Cal., 418 F.Supp. 417 (N.D. Cal. 1976), the U.S. District Court for the Northern District of California denied an air freight company's attempt to enjoin a curfew, on all aircraft which emitted more than 75dB, imposed at the municipally owned Hayward Air Terminal in California. Squarely addressing the issue of preemption under section 7, the court ruled that the proprietor of a public airport can control what types of aircraft may use the airport as well as decide what restrictions will be imposed on airport users. National Aviation at 421.

In a declaration of "Aviation Noise Abatement Policy," the Federal Aviation Administration summarized the respective roles of Federal, State and local governments in aircraft control as follows:

> 1. The Federal government has pre-empted the areas of airspace use and management, air traffic control, safety and the regulation of aircraft noise at its source. The Federal government also has substantial power to influence airport development through its administration of the Airport and Airway Development Program.
>
> 2. Other powers and authorities to control airport noise rest with the airport proprietor - including the power to select an airport site, acquire land, assure compatible land use, and control airport design, scheduling and operations - subject only to

> Constitutional prohibitions against creation of an undue burden on interstate and foreign commerce, unjust discrimination, and interference with exclusive federal regulatory responsibilities over safety and airspace management.
>
> 3. State and local governments may protect their citizens through land use controls and other police power measures not affecting aircraft operations. In addition, to the extent they are airport proprietors, they have the powers described in paragraph 2.
>
> Dept. of Transportation, FAA, "Aviation Noise Abatement Policy", Nov. 18, 1976 - p. 34

2. Railroad Regulation

Section 17 of the NCA delegates authority to EPA to set noise emission standards for railroads engaged in interstate commerce. To date, 4 January 1980, EPA has promulgated standards for noise from: active retarders, locomotive load cell test stands, car coupling, and switcher locomotives (45 Fed. Reg. 1252 et seq.). These regulations were required by Association of American Railroads v. Costle, 562 F.2d 1310, 1320 (2d.Cir. 1977), in which the U.S. Court of Appeals for the District of Columbia stated that "We ... conclude that the EPA has interpreted its statutory mandate too narrowly in regulating only locomotives and rail cars, and no facilities at all." Pursuant to this ruling, EPA is promulgating regulations to comprehensively cover railroad facilities. The second portion of the appropriate regulations are to take effect 15 January 1984.

Section 17 delegates the implementation and enforcement authority for the control of noise to the Department of

Transportation. Specifically, the NCA directs that DOT, after consultation with EPA, shall promulgate regulations to insure compliance with the standards promulgated by EPA.

Preemptive language concerning railroads is present in section 17(c)(1):

> ...no State or political subdivision thereof may adopt or enforce any standard applicable to noise emissions resulting from the operation of the same equipment or facility of such carrier unless such standard is identical to a standard applicable to noise emissions resulting from such operation prescribed by any regulation under this section. 42 U.S.C. Sec. 4916.

However, this language does not preclude all State and local noise regulation of railroad noise. State and local jurisdictions may adopt and enforce standards applicable to noise emission resulting from operation of interstate railroad if the standards are identical to those promulgated by EPA. State and local jurisdictions may also control, license, regulate or restrict the use, operation or movement of railroads if the EPA determines that such restriction is necessitated by special local conditions and is not in conflict with Federal regulations. This is effected through section 17(c)(2) of the Noise Control Act of 1972 which authorizes the Administrator of the EPA to issue waivers after considering special local conditions. State and local governments may also adopt and enforce noise emission standards where EPA has not regulated. One U.S. District Court (Third Circuit) has interpreted the Supreme Court's broad reading of section 17 in Association of American

Railroad v. Costle (supra) to mean that noise emitted within marshalling and switching yards is covered under federal regulations. Consequently, local regulations which are not identical to the full scope of Federal regulations are preempted. Consolidated Rail Corporation v. City of Dover, 450 F.Supp. 966 (U.S. D.C. Delaware 1978). Although this interpretation appears to widen the field of preemption by the Federal government, the NCA states that State and local governments can establish railroad regulations for those areas not regulated by the EPA.

3. Interstate Motor Carrier Regulations

Section 18 of the Noise Control Act provides procedures nearly identical to those of Section 17 for promulgation and adoption of regulations for interstate motor carriers. As in railroad regulation, State and local governments can adopt and enforce standards applicable to noise emission resulting from operation of interstate motor carriers if the standards are identical to those promulgated by EPA. State and local jurisdictions may also apply for waivers from the EPA for special local conditions. Where EPA has not regulated, State and local governments may adopt and enforce noise emission standards for interstate motor carriers.

4. New Product Noise Standards

Section 6 of the Noise Control Act authorizes EPA to establish noise emission standards for each product distributed in commerce:

> (a) which is identified ... in any report under section 5(b)(1) as major source of noise;

(b) for which in his (administrator's) judgement, noise emission standards are feasible, and

(c) which falls in one of the following categories:

(i) Construction equipment

(ii) Transportation equipment (including recreational vehicles and related equipment)

(iii) Any motor or engine (including any equipment of which an engine is an integral part).

(iv) Electrical or electronic equipment.

To date, EPA has promulgated noise emission standards, some of which are now effective, for air compressors, medium and heavy trucks, solid waste compactors (garbage trucks), railroads, hearing protectors, and buses. Labeling requirements for other new products will follow.

State and local governments retain multiple options for control of noise from new products distributed in commerce. For those products regulated by the EPA, State and local governments can establish time-of-sale regulations identical to the Federal standards. To implement such regulations, State and local governments can use the standard noise enforcement strategies used by EPA, for example production verification (PV), and selective enforcement auditing (SEA). Production verification is the testing by a manufacturer (or EPA at the option of EPA) of early production models to verify, prior to substantial marketing of a product whether a manufacturer has the requisite noise control technology in hand to produce complying products across the entire product line. Manufacturers are required to submit the PV test results to EPA prior to distribution

of the products in commerce. Selective Enforcement Auditing is the testing by a manufacturer or EPA, pursuant to an administrative request, of a statistical sample of products from a particular category or configuration to determine whether the products conform to the noise standards. In case of non-confirmity SEA provides the basis for further enforcement actions, such as recall and cease-to-distribute orders.

State and local governments can also adopt and enforce in-use controls for new products regulated by EPA in the form of licensing, regulation and restrictions. Strategies for in-use controls include: time-of-sale warranties by manufacturers that the product conforms to noise regulations, prohibitions on the removal of any noise attenuating device from a new product; prohibitions on the use of a new product after such removal or tampering, requirements that manufacturers affix labels to each product indicating its conformity with EPA noise emission standards, and requirements that manufacturers provide instructions for proper mainentance, use and repair in order to minimize the degradation of the noise reduction on features of the product.

B. COMMERCE CLAUSE (ARTICLE I, SECTION 8)

The Commerce Clause of the U.S. Constitution provides that the "Congress shall have the power to...regulate Commerce with foreign nations, and among the several States, and with the Indian tribes;" U.S. CONST. art.1, §8. Because the Federal government is given the authority to regulate interstate commerce under this provision, State regulations

must not impose a burden on interstate commerce which disrupts the required uniformity of Federal regulation. To determine whether an undue burden on interstate commerce exists, courts perform a balancing test, comparing the importance and character of the State activity, with its effects on interstate commerce. This Constitutional issue may arise in connection with noise control measures which affect interstate motor carriers or interstate rail carriers. Drafters of State noise control regulations should attempt to minimize the impact on interstate commerce to help avoid invalidation under the Commerce Clause.

C. FREEDOM OF SPEECH (FIRST AMENDMENT).

Drafters of State and local noise regulations must consider the First Amendment right to freedom of speech, and whether such regulations might be found to be an infringment. For example, local ordinances prohibiting the use of sound amplification devices unless city officials grant permission have been held in violation of the First Amendment when no standards are prescribed for the granting of such permits. In Saia v. New York, 334 U.S. 558 (1947), the Supreme Court recognized that such unlimited, unqualified discretion in defining and enforcing ordinances constitutes a prior restraint on the exercise of free speech. Ordinances which establish enforcement standards which are too vague for uniformity, and thus depend on the subjectivity of the enforcing officer, may violate the First Amendment. For example, in United States Labor Party v. Rochford, 416 F.Supp. 204, 205 (N.D. Ill. 1975), an ordinance which

prohibited making certain types of noise on a public way or close enough to a public way so as to be "distinctly and loudly audible upon such public way" was declared unconstitutional. The court found the standard was too vague to be enforced against speakers not on public ways since its enforcement might depend upon an officer's "hearing acuteness... temperament...frame of mind or opinion of the merits of the speech which is being broadcast." U.S. Labor Party at 205. The court ruled that when a city has no legitimate interest in banning amplified messages which do not exceed sound levels encountered daily in most communities, such prohibitions constitute an unconstitutional prior restraint on freedom of speech.

Ordinances placing reasonable and specific limitations on the time and place of speech do not appear to violate the First Amendment. In Kovacs v. Cooper, 336 U.S. 77 (1949), the Supreme Court upheld an ordinance which prohibited any "loudspeaker or instrument which emits loud and raucous noises" from public streets. The Court ruled that the ordinance did not violate petitioner's First Amendment rights because messages could be broadcast from other areas and by less noisy means. The Court emphasized that:

> The unwilling listener is not like the passerby who may be offered a pamphlet in the street, but cannot be made to take it. In his home or on the street he is practically helpless to escape this interference with his privacy by loudspeakers except through the protection of the municipality. Kovacs at 86.

Similarly, a noise ordinance which forbids deliberately noisy or diversionary activity that disrupts or is about to disrupt normal school activities at fixed times when school is in session and at a sufficiently fixed place adjacent to the school does not violate First Amendment Freedom of Speech. Grayned v. City of Rockford, 408 U.S. 104, 106 (1972).

Basic guidelines for the drafter of noise control ordinances may be derived from these cases dealing with First Amendment freedom of speech. In general, a limit placed by a State or locality on the time or place of speech is constitutionally valid if the limit reasonably serves some permissible State or local interest and has the least possible restriction on freedom of speech. Regulations requiring a permit to use a loudspeaker, or engage in other noise-emitting activities, which allow discretion to deny the permit based on the content of speech, may be invalidated as prior restraints on freedom of speech. Similarly, ordinances which do not prescribe standards of enforcement but instead rely on the subjectivity of the enforcing officer in defining and enforcing noise violations may be unconstitutional under the First Amendment.

D. VAGUENESS (FIFTH AMENDMENT DUE PROCESS)

Vagueness in noise control regulations raises the issue of Fifth Amendment due process. By interpretation, the Fifth Amendment provision that "No person shall...be deprived of life, liberty, or property without due process of law;..." U.S. CONST. Amend. V, requires that laws be sufficiently

definite to put a reasonable person on notice of what conduct is prohibited by a specific law. Noise ordinances which have been challenged in this area usually identify the prohibited noise by its general character or nature rather than by decibel standards. For example, a local ordinance providing that:

> "it shall be unlawful for any person to make, continue or cause to be made loud, unnecessary or unusual noise which annoys, disturbs, injures or endangers the comfort, repose, health, peace and safety of others

was held unconstitutionally vague in United Pentecostal Church v. Steendam, 214 N.W.2d 866 (Mich App. 1974). However, other courts have upheld similar language in ordinances, without finding a vagueness problem. An Ohio Court upheld an ordinance prohibiting exhaust discharges "except through a muffler or other device which will effectively prevent loud or explosive noise therefrom." Dayton v. Zoller, 122 N.E.2d 28 (Ohio App. 1954). The court stated that the ordinance was not unconstitutionally vague because the language defined the prohibited act with sufficient specificity. State statutes using terms such as "excessive and/or unusual noise" have also been upheld. See, Smith v. Peterson, 280 P.2d 522 (Cal. 1955).

The case law, therefore, has developed no definite standards for Constitutional challenges based on Fifth Amendment due process vagueness. Subjective standards such as statutory nuisance provisions and disturbing the peace provisions may be subject to a Constitutional challenge of vagueness, whereas, objective standards for

noise control, which are sufficiently specific to provide notice, will survive constitutional challenge.

E. SEARCH AND SEIZURE (FOURTH AMENDMENT)

Enforcement procedures for noise regulations which may require search or seizure must not violate the Fourth Amendment, which provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause...
>
> U.S. CONST. amend. IV

Generally a search warrant is required for a search or seizure. Exceptions to the warrant requirement are narrowly defined: consent to search, search incident to full-custody arrest, exigent circumstances such as hot pursuit or plain view. See, Coolidge v. New Hampshire, 403 U.S. 443, 455 (1970).

Administrative searches have been defined as involving a routine inspection of a class of persons or businesses in order to secure compliance with various regulations or statutes. Because a large percentage of noise violations are made by commercial and industrial facilities, the noise enforcer must consider warrant requirements in administrative searches.

In Marshall v. Barlow's Inc. 436 U.S. 307 (1978), the Supreme Court invalidated an Occupational Safety and Health Administration warrantless inspection of an electrical and

plumbing business. Although section 8(a) of the Occupational Safety and Health Act required an employer to allow inspectors to enter the work premises without delay, the Supreme Court maintained the general rule that warrantless searches are generally unreasonable, and that this rule applies to commercial establishments as well as to private residences. Barlow at 312.

In Barlow, however, the Supreme Court observed that its decision concerning OSHA inspections did not automatically invalidate all warrantless inspection programs. The Court outlined three exceptions to its holding. First, "pervasively regulated" businesses and "closely regulated industries long subject to close supervision and inspection," e.g., liquor and firearms, present special circumstances in which a warrantless inspection search may be permissible. The Court stated,

> Certain industries have such a history of government oversight that no reasonable expectation of privacy... could exist for a proprietor over the stock of such an enterprise. Barlow at 313.

Second, other federal statutes dealing with judicial enforcement when entry for inspection is refused are also outside the scope of the Barlow ruling. The Barlow opinion is based on the facts and law concerned with OSHA. Barlow at 321. Finally, the Court emphasized that other statutory schemes allowing warrantless administrative searches may be constitutional. The Court concluded,

> ...The reasonableness of the warrantless search, however, will depend upon the specific enforcement needs and privacy guarantees of each statute. Barlows at 321.

Therefore, while in some cases the court may rule that a statutory noise control scheme for administrative searches without a warrant is permissible, as a general rule, search warrants are required. To avoid Fourth Amendment problems, drafters of noise regulations may wish to write into the noise ordinance that a search warrant should be obtained in all cases where entry is sought, unless a valid consent is given. Alternatively, procurement of a warrant can be incorporated as part of the enforcing officer's standard operating procedure.

F. EQUAL PROTECTION (FOURTEENTH AMENDMENT)

Noise regulations must comply with the Fourteenth Amendment requirement that no State shall "deprive any person of life, liberty, or property, without due process of law; nor deny...the equal protection of the laws. U.S. CONST. amend XIV. Legislative classifications in an ordinance must be reasonable, non-arbitrary and must establish classifications having a fair and substantial relation to reasonable legislative objectives so that all persons in similar circumstances are treated alike. For example, an ordinance requirement for limited hours of operation for a business which created noise disturbances, has been upheld under the Fourteenth Amendment Equal Protection Clause as a valid exercise of police power and within the proper scope of municipal authority. (Perkins Cake & Steak, Inc. v. City of Bloomington, No. 740694 (D.C. Minn. 1978)).

IV. OTHER LEGAL ISSUES

Drafters of State and local noise regulations should be aware of the following additional legal issues which may arise in the course of noise control activities:

A. Sovereign Immunity

Under the common-law doctrine of sovereign immunity, the government is immune from suit by its political subdivisions and its citizens, unless it has expressly consented to be sued. The immunity of the domestic sovereign is based on the historic principle that no court has the power to command the King. Sovereign immunity applies to the Federal and State governments and, to a limited extent, local governments.

Because Federally owned and/or operated facilities are potentially a major source of noise violations, the enforcer must consider to what extent these facilities are subject to prosecution for noise violations. Section 4(b) of the Noise Control Act states that:

> (b) Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government -
>
> (1) having jurisdiction over any property or facility, or
>
> (2) engaged in any activity resulting, or which may result, in the emission of noise, shall comply with Federal, State, interstate, and local requirements respecting control and abatement of environmental noise to the same extent that any person is subject to such requirements...

In Hancock v. Train, 426 U.S. 167 (1976), the Supreme Court addressed the issue of compliance by Federal facilities

under section 118 of the Clean Air Act. The Court ruled that Federal facilities located in Kentucky were not obligated to obtain an operating permit from the State although such a permit was required under the Kentucky pollution control plan. The Court held that section 118 of the Clean Air Act mandates Federally owned and or operated facilities to comply with substantive requirements of State pollution plans, but that compliance with administrative requirements is not required. Because Section 4 of the Noise Control Act is nearly identical to section 118 of the Clean Air Act and has an analogous legislative history, judicial interpretation of section 4 should conclude that under the Noise Control Act federal facilities must comply with substantive requirements of state and local noise control provisions, but not administrative requirements.

Courts have uniformly held that State governments and their agencies can be protected by absolute sovereign immunity. Therefore, a State government may be immune from suits arising from violations of regulations it has enacted as well as violations of local ordinances. A State, however, may waive its immunity through express statutory or constitutional provisions. These provisions must expressly delineate the extent of waiver intended by the drafter. For example, a State may waive its immunity from prosecution for noise violations by including itself within the scope of a noise statute. For example New Jersey's Code has stated:

> "Person" means any corporation, company association, society, firm, partnership, and joint stock company as well as individuals and shall also include the State and all its political subdivisions, any agencies or instrumentalities thereof.
>
> N.J.S.A. 13: 1G-1(e)(1971)

Such provisions effectively waive a State's immunity from prosection under State statutes but it is questionable whether they constitute sufficient waiver of State immunity from enforcement of local noise ordinances. If the local regulations are identical to the State noise provisions, a court may either rule that the State waiver extends to all noise regulations, both State and local, or rule that the State did not intend to subject itself to prosecution by each locality for noise violations. Particularly when a local ordinance contains more stringent regulations than does the State noise statute, a court may find that the State has not consented to waive its immunity from local regulations. Enforcers of local noise regulations should review all relevant State Constitutional and statutory material in an attempt to find an effective waiver of State immunity. However, the validity and extent of these waivers are ultimately subject to judicial determination.

A local government whether county or municipal, is more amenable to suit than is the state. Because all sovereign immunity is derived from the state, the state may determine the extent of local sovereign immunity. 81 C.J.S. States §229 et. seq. (1971). For example, a state may explicitly

waive a local government's immunity by including it within the definition of persons subject to regulatory enforcement. See Md. Ann. Code art. 43, §828 (1974), discussed infra. Moreover, local governments may specifically provide that their agencies shall comply with State noise regulations. For example:

> All municipal departments and agencies shall comply with federal and state laws and regulations and the provisions and intent of this chapter respecting the control and abatement of noise to the same extent that any person is subject of such laws and regulations.
>
> ANCHORAGE, ALASKA ORD Ch. 15.70.040(c)(1978).

However, because all local governmental immunity is derived from the State, these provisions are more declarations of local compliance rather than self-executing waivers of sovereign immunity.

The local government on both the county and municipal level is more amenable to suits by its own departments and citizens than is the State. See 62 C.J.S. However, there is no mechanical formula used by courts to determine the extent to which a municipality must follow its own ordinances. A small number of jurisdictions apply strict sovereign immunity to the local government. Most courts use a "governmental-proprietary function" test. See "Government Immunity From Local Zoning Ordinances" 84 Harv L. Rev. 869 (1971). In this test, the court classifies the violating

activity as either governmental, i.e., when a municipality is acting pursuant to and in furtherance of obligations imposed by the legislative mandate, or proprietary, i.e., when the act is permissive in nature and the municipality has the power but not an obligation to perform the function. If the activity is classified as governmental, there is no mandatory compliance with the ordinance. If the activity is classified as proprietary, the municipality must comply with its ordinance. However, there is no uniformity in defining given activities as governmental or proprietary. For example, sewage treatment, garbage disposal and water supply have been classified as both governmental and proprietary in different jurisdictions.

There are numerous approaches used by courts to determine whether one local government must comply with another's ordinances and regulations. Some jurisdictions use a "superior sovereign" test in which the higher level government is not required to comply with ordinances enacted by lower levels of government within the same State, for example, a county is not required to comply with a city's ordinance. See Tim v. City of Long Branch, 53A2d. 164 (N.J. 1947). The "state agency" approach used by some jurisdictions maintains that a county or other political subdivision is not subject to a local ordinance because it is acting as an arm of the State and is not protected by sovereign immunity. See Hall v. City of Taft 302 P2d.

574 (Cal. 1956). The governmental-proprietary function approach classifies the violating activity as either governmental or proprietary to determine if there is mandatory compliance with another locality's ordinance. (see discussion, above). Finally, some courts use a balancing approach in which the violating activity and the function of enforcing the local ordinance are compared. Factors commonly considered in these balancing tests are: specific statutory authority for the violating activity, scope of the ordinance, direct conflict of functions, cost of compliance, and whether the violating activity is a common-law nuisance. See Note, "The Inapplicability of Municipal Zoning Ordinances To Governmental Land Uses," 19 Syracuse L. Rev. 698 (1968).

Many local noise ordinances presently include other localities within the scope of their provisions. For example, the City of Fond Du Lac, Wisconsin defines "person" as,

> Any individual, association, partnership, or corporation, includes officer, employee, department, agency or instrumentality of a State or any political subdivision.
>
> CITY OF FOND DU LAC, WIS. Ord. §17.03 (1976).

Although such provisions are not dispositive in subjecting other governmental units to noise provisions where there has been no waiver by the violating governmental body, these provisions have persuasive value in the court's balancing of the violating activity with the local ordinance, and in requiring compliance with the local regulation.

B. State Preemption

State governments may preempt local regulations which conflict with State regulations. State constitutions may expressly delineate the scope to which a State preempts local action. For example,

> Any city or town may by adoption, amendment, or repeal of local ordinance or by-laws, exercise any power or function which the general court has power to confer upon it, which is not inconsistent with the Constitution or laws enacted by the general court...
>
> MASS. CONST. Art. 2 §6.

State statutes can also limit local regulation in a given area. The Iowa Code, for example, specifies in detail the type of motor traffic signs which must be adopted by municipalities. See, IOWA CODE §15.71 M20

State courts have held that local regulation of noise pollution outside the scope of the locality's home rule authority is preempted by the State. See, Des Plains v. Chicago and Northwestern Railway Co., 357 N.E.2d 433 (1976). Additionally, some State courts have held that local environmental ordinances establishing more stringent permit requirements than those established by the State environmental protection laws are preempted by the State. See, Carlson v. Village of Worth, 343 N.E.2d 493, 499 (Ill. 1975).

To help avoid invalidation of local regulation through preemption, drafters of local noise regulations should know the scope of relevant home-rule provisions as well as

any constitutional or statutory provisions which explicitly preempt local action in a given area.

C. Incorporation By Reference

A State or locality may adopt regulations and statutes by incorporating them by reference. This drafting technique reduces length and repetition in the new ordinance being enacted. It is a well established principle that incorporation by reference is permissible when the provisions being incorporated are clearly in existence at the time of including them in the new legislation, subject only to State Constitutional and statutory limitations. However, incorporation by reference of future statutes, standards, or procedures, raises the issue of improper delegation of legislative power, a Constitutional prohibition which is derived from the doctrine of separation of power wherein Congress and State legislatures hold all legislative authority. See 82 C.J.S. Statutes §70 et. seq. (1953). This issue is particularly relevant to noise control statutes and ordinances which use test procedures and definitions of the American National Standards Institute (ANSI). Some courts have ruled that allowing such non-governmental agencies to supply terms and change standards constitutes unlawful delegation of power. See, e.g., Colorado Polytechnic College v. Bd. for Community Colleges and Occupational Education, 476 P.2d 38, 42 (1970). There is some authority, however, for the adoption of such future changes in standards under the rationale that the non-governmental bodies merely "fill in the details" of

State legislation and as such there is no unconstitutional delegation of authority. See, Ex parte Gerino, 77 P. 166, 167 (1904).

Drafters of noise regulations can best avoid the potential charge of unconstitutional delegation of authority by incorporating only statutes and regulations which are in existence at the time of drafting. If standards established by professional bodies, such as ANSI, are used, drafters should expressly state the scope and source of the incorporated provisions. For example,

> Test procedures...shall be in substantial conformity with ANSI standard S1 4-1961 or IEC standard S1.11-1966...
>
> CHICAGO, ILLINOIS ORDINANCE §17-4.27 (1971).

D. Severability

To help avoid the possibility that an entire ordinance will be invalidated as a result or a legal challenge to one provision, drafters should include a severability clause. An example of a severability clause follows:

> If any provision of this ordinance is held to be unconstitiutional or otherwise invalidated by any court of competent jurisdiction, the remaining provisions of the ordinance shall not be invalidated.
>
> NIMLO/EPA MODEL NOISE ORDINANCE sec. 11.7

The common-law presumption is that when any provision is declared unconstitutional, remaining provisions fall with it. In Dorchy v. Kansas, 264 U.S. 286 (1924), however, the Supreme Court established a two-prong test to determine when

an act need not be invalidated in entirety: (1) Where legal effect can be given to the unchallenged provisions when standing alone and (2) where the legislative intent appears to favor severabilty. The presence of a severability clause in a noise control ordinance, although not dispositive in itself of whether the remainder of an act will stand, provides a rule of construction for the court which aids in finding legislative intent in favor of severability.

DRAFT
1/1/79

ORDINANCE DRAFTER

STATE AND LOCAL NOISE ENFORCEMENT LEGAL MEMORANDA

Noise Enforcement Division
U.S. Environmental Protection Agency
Washington, D.C.

SUBJECT: Fourth Amendment - Search and Seizure

ISSUE: Are searches or seizures of persons or property permissible in noise control enforcement?

BRIEF ANSWER: The Fourth Amendment of the United States Constitution permits reasonable searches and seizures pursuant to consent or a proper warrant. In both criminal and administrative search and seizures, drafters and enforcers of noise control provisions should consider the requirements for consent and for search warrants in order to avoid constitutional challenges on the basis of the Fourth Amendment.

DISCUSSION: In drafting State and local noise control laws, consideration should be given to whether effective enforcement may require searches or seizures of persons or property. For example, enforcement officials may wish to gain entry upon personal property to discover the source of a possible noise violation. If such procedures are contemplated, drafters of noise control provisions may wish to provide guidelines for execution and administration of searches and seizures. These procedures must be consistent with the Fourth Amendment which provides:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches

> and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
>
> U.S. CONST. amend. IV.

Under the Fourth Amendment, a search warrant is generally required in order to conduct searches and seizures if the party to be searches has a reasonable expectation of privacy. When such an expectation exists, a search or seizure without a warrant, unless covered by an exception to warrant requirements, is unconstitutional, and evidence thus obtained is inadmissible at trial. See, Katz v. United States, 389 U.S. 347, (1967); Mapp v. Ohio, 367 U.S. 643, 655 (1961). In Katz at 357, the Supreme Court articulated the requirements of the Fourth Amendment: "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment - subject to only a few specifically established and well-delineated exceptions."

Narrow exceptions to the warrant requirement have been recognized, such as searches conducted incident to a full-custody arrest, where there is valid consent to a warrantless search, or where there are exigent circumstances present. See, Coolidge v. New Hampshire, 403 U.S. 443, (1971). In United States v. Robinson, 414 U.S. 218, (1973) the Supreme Court upheld a warrantless search of an individual who had been arrested for operating a motor vehicle after revocation of his licence. To qualify as an exception to the warrant requirement of search incident to arrest,

United States v. Robinson, 414 U.S. 218, (1973), the Supreme Court upheld a warrantless search of an individual who had been arrested for operating a motor vehicle after revocation of his licence. To qualify as an exception to the warrant requirement of search incident to arrest, however, the search must not be too far removed from the time and place of the arrest. See, e.g., U.S. v. Edwards, 415 U.S. 800 (1974) (search of arrested person's possessions at place of detention was sufficiently related to arrest to qualify under the incident to arrest search warrant exception).

A recent Supreme Court decision has resolved many of the uncertainties regarding the constitutionality of the random stopping of automobiles to spot check for drivers licenses and registrations. Delaware v. Prouse ___ U.S. ___, 99 S.Ct. 1391 (1979). The Court's reasoning in Prouse can be ablied as well in the context of stops made for the purpose of conducting a noise test. Prior to Prouse, there had been a conflict between jurisdictions regarding the reasonableness of a stop for the purpose of checking drivers licenses and registrations. Five jurisdictions had ruled

that the Fourth Amendment prohibits this type of seizure[1] while six jurisdictions had ruled that it does not.[2]

In Prouse, a patrolman stopped an automobile as a routine procedure to check the driver's license and registration. He had observed neither traffic or equipment violations nor any suspicious activities. He was not acting pursuant to any standards, guidelines or procedures pertaining to document spot checks promulgated either by his deparment or by the State's Attorney General. Prouse, 99 S.Ct. at 1394.

The trial court granted a motion to dismiss stating that the stop was wholly capricious and violative of the Fourth Amendment. This decision was upheld by the Delaware Supreme Court and the United States Supreme Court granted certeroari.

The Court initially decided that stopping an automobile and detaining its occupants constitutes a seizure within the meaning of the Fourth Amendment even though the purpose of

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[1] Commonwealth v. Swanger 543 Pa. 107, 307, A.2d 875 (1973); United States v. Montgomery U.S. App. D.C., 561 F.2d 875 (1977); People v. Ignle 36 N.Y. 2d 413 330 N.E. 2d 34 (1975); State v. Ocho, 23 Ariz. App. 510, 534 F.3d 441 (1975); rev'd on other grounds, 112 Ariz. 582, 544 P.2d 1097 (1976); United States v. Nicholas 445 F.2d 622 (8th Cir. 1971).

[2] State v. Holmberg, 194 Neb. 337, 231 N.W. 2d 672 (1975); State v. Allen, 282 N.C. 503, 194 S.E. 2d 9 (1973); Palmore v. United States, 290 A.2d 573, (D.C. App. 1972) aff'd on jurisdictional ground only, 411 U.S. 389 (1973); Leonard v. State, 496 S.W. 2d 576 (Tex. Crim. App. 1973); United States v. Jenkins, 528 F.2d 713 (10th Cir. 1975); Myricks v. United States, 370 F.2d 901 (5th Cir.) cert. denied 386 U.S. 1015 (1967).

the stop is limited and the resulting detention is quite brief. 99 S.Ct. at 1396, United States v. Martinez-Fuerte 428 U.S. 543, 556-58 (1976); United States v. Brignoni-Ponce, 432 U.S. 873, 878, (1975). Under the Fourth Amendment any seizures based on the discretion of law enforcement personnel must be based on a reasonableness standard in order "to safeguard the privacy and security of the individual against arbitrary invasion." Prouse, 99 S.Ct. at 1396, quoting Marshall v. Barlows Inc. 436 U.S. 307, 312 (1978). The reasonableness of a particular law enforcement practice is judged by balancing its intrusion on the indiviudal's Fourth Amendment interests against its promotion of legitimate government interests. Normally reasonableness is determined by utilizing some objective standard, whether this be probable cause or some less stringent test. See Terry v. Ohio 392 U.S. 1 (1968).

In Prouse, Delaware urged that a police officer's discretion should be unfettered when he is deciding which cars to spot check for licenses and registration. The State maintained that these stops were reasonable because its interest in securing the safety of drivers on its roadways. Prouse, 99 S.Ct. at 1397. The Court had to balance the reasonableness of the methods utilized by Delaware to achieve this goal against the resulting intrusion on the privacy and security of the individuals detained.

The Court found these stops to be a physical and psychological intrusion on the occupants of the vehicle. They were found to interfere with freedom of movement, to be inconvenient, to consume time, and also to create substantial anxiety. Prouse, at 1398. The court also found the contribution to highway safety by the use of spot checks to be minimal at best. They held that while unlicensed drivers may be presumed to drive less safely than licensed drivers, unlicensed drivers were only a small percentage of all drivers, and there was only a slight chance that unlicensed drivers would be found through spot checks. Therefore, the Court determined that the marginal contribution to roadway safety resulting from a system of discretionary spot checks could not justify subjecting every occupant of every vehicle on the road to a seizure, limited in magnitude compared to other intrusions, but nonetheless constitutionally cognizable.

An officer must have an appropriate factual basis for suspicion directed at a particular automobile or some other substantial and objective standard or rule to govern the exercise of discretion. Therefore, except in those situations in which there is at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of the law, stopping an automobile and detaining the driver in order to

check his drivers license and the registration of the automobile are unreasonable under the Fourth Amendment. Prouse at 1401.

The Court's decision did not prohibit all stops not based on probable cause or reasonable suspicion. They specifically indicated that States may develop methods for spot checks that are less intrusive or that do not involve the unlimited exercise of discretion. It was suggested that all on-coming traffic at roadblock type stops could be questioned, as these stops are not the product of unbridled police discretion. Prouse, at 1401.

The Court has repeatedly held that the brevity of the stop does not make it any less intrusive and does not remove the Fourth Amendment requirement of reasonableness. Therefore State and local governments should be prepared to show that the stop of an automobile, in order to conduct a noise test, is based on probable cause, reasonable suspicion, or some other standard which meets the Fourth Amendment requirement of reasonableness.

In view of the cases previously discussed, the use of fixed checkpoints to stop and test automobiles for noise level violations may be the best method for State and local governments to adopt when they desire to conduct such tests without meeting the Fourth Amendment requirement of probable cause or reasonable suspicion.

A warrant is not required where consent to the search has been given. Schneckloth v. Bustamonte, 412 U.S. 218, (1973). However, consent to a warrantless search must be voluntary. Schneckloth at 225. Voluntariness is tested by the totality of the circumstances surrounding the consent; for example, the age and intelligence of the consenting party, the words and actions of the officer, coercion, if any, and the setting of the consent are factors to consider in determining whether the consent was truly voluntary. Schneckloth at 226. Whether there was authority to give consent must also be considered; for example, a person with possessory rights to the area being searched generally has authority to consent to a warrantless search. However, a lower level employee may not have authority to give consent to a warrantless search of a business. See, e.g., United States v. Matlock, 415 U.S. 164, (1974) (common areas of house); United States v. Lagow, 66 F. Supp 738, (S.D.N.Y. 1946) (average employee cannot consent to search of business premises). Current EPA enforcement procedures state that consent must be given either by the owner of the premises or by the person in charge of the premises at the time of the proposed inspection.

The Supreme Court has prescribed limited circumstances which constitute another exception to the warranty requirement - that of "exigent circumstances". When the police are in hot pursuit of a suspect, immediate search or seizure

without a warrant is permissible. Warden v. Hayden, 387 U.S. 294, (1967). Similarly, a warrant is not required to seize items found in "plain view" when officers are legitimately on the premises for purposes other than seizure of the item found. Hayden at 298. For example, police investigating a disturbance of the peace complaint in a private residence may seize contraband found in plain view. However, the plain view exception must be based on a prior valid intrusion.

Administrative searches are a special category of searches under the Fourth Amendment. In general, administrative searches have been defined as involving "a routine inspection of a class of persons or businesses in order to secure compliance with various regulations or statutes." Rothstein, M.A. and Rothstein, L.F., Administrative Searches and Seizures: What Happened to Camara and See?, 50 WASH. L.REV. 341, 384 (1975). Administrative searches may be common in noise enforcement schemes. For example, regulations may require that products meet prescribed noise emission standards and provide for inspections to check compliance. Therefore, drafters of noise regulations must consider possible Fourth Amendment problems in such searches.

The Supreme Court recently considered the constitutionality of warrantless administrative searches in Marshall v. Barlow's Inc., 436 U.S. 307 (1978). It held that section 8(a) of the Occupational Safety and Health Act of 1970 which allowed warrantless inspections to search for violations of

OSHA regulations violated the Fourth Amendment. The Court stated the "The Warrant Clause of the Fourth Amendment protects commercial buildings as well as private homes. To hold otherwise would belie the origin of the Amendment, and the American colonial experience." Barlow's Inc. at 311.

In Barlow, however, the Supreme Court placed limitations upon the warrant requirements for administrative searches. First, as in searches and seizures for criminal offenses, a valid consent may dispense with the warrant requirements. Barlow at 316. Second, certain "pervasively regulated businesses" may be subject to warrantless inspections. Included in this category are liquor and firearms industries. See, Colonnade Catering Corp. v. United States, 397 U.S. 72, 77 (1970); United States v. Biswell, 406 U.S. 311, 316 (1972). The Court in Barlow rationalized this limited exception to the warrant requirement by stating that:

> "Certain industries have such a history of government oversight that no reasonable expectation of privacy could exist for a proprietor over the stock of such enterprise...when an entrepreneur embarks upon such a business, he has voluntarily chosen to subject himself to a full arsenal of government regulation." Barlow at 313.

A third limitation on the warrant requirement results from the limited scope of the Barlow holding. The Barlow Court specifically limited its holding to the warrantless entry procedure of the Occupational Safety and Health Act.

It suggested that there may be other statutory schemes for warrantless searches which do not violate the Fourth Amendment:

> The reasonableness of a warrantless search, however, will depend upon the specific enforcement needs and privacy guarantees of each statute. Some of the statutes cited apply only to a single industry, where regulations might already be so pervasive that a Colonnade-Biswell exception to the warrant requirement could apply. Some statutes already envision resort to federal court enforcement when entry is refused, employing specific language in some cases and general language in others. Barlow at 321.

On its face, therefore, the Barlow holding does not invalidate all warrantless administrative searches. However, the Environmental Protection Agency has accepted the Barlow holding as binding on administrative searches conducted by EPA under the Noise Control Act of 1972, and has revised its noise emission regulations for medium and heavy trucks and portable air compressors to comply with the Barlow holding:

> Any entry without 24 hour prior written or oral notification to the affected manufacturer shall be authorized in writing by the Assistant Administrator for Enforcement.
>
> 40 CFR 204.4(e)

A State or local noise control statute or ordinance which provides for warrantless administrative searches may be considered narrow enough to pass Constitutional scrutiny by courts. However, because of the acknowledgement that administrative searches generally require search warrants, particularly on the federal level of noise control enforcement, State and local schemes should require consent or

search warrants as part of the operating procedure for enforcement of noise control regulations in order to avoid Constitutional challenges under the Fourth Amendment.

The procedure of obtaining (ex parte) and executing search warrants for administrative searches must also comply with the Fourth Amendment. The standard of probable cause necessary to obtain an administrative warrant is more flexible than that required for criminal search warrants. In Barlow, the Supreme Court articulated the probable cause standard:

> Probable cause in the criminal sense is not required. For purposes of an administrative search such as this, probable cause justifying the issuance of a warrant may be based not only on specific evidence of an existing violation but also on a showing that "reasonable legislative or administrative standards for conducting an...inspection are satisfied with respect to a particular [establishment.]" A warrant showing that a specific business has been chosen for an OSHA search on the basis of a general administrative plan for the enforcement of the Act derived from neutral sources... would protect an employer's Fourth Amendment rights.
>
> Barlow at 320-321 quoting Camara v. Municipal Court, 387 U.S. 523, 538 (1967).

The warrant obtained for administrative searches must be particular in scope. See, Steele v. United States, 267 U.S. 498 (1925). For example, if products at a particular retail outlet are the focus of an inspection, the warrant must clearly state which outlet and which products are to be inspected; if multiple facilities are the focus of inspection,

a separate warrant must be obtained for each facility. Unless a valid consent has been given to exceed the scope of the warrant, searches beyond the areas prescribed in the warrant and seizure of items not listed in the warrant violate the Fourth Amendment unless they qualify under the plain view exception. See, Coolidge v. New Hampshire, 403 U.S. 443, (1971).

The noise enforcement officer must present the warrant upon entry to the place of inspection. Service may be made upon any employee of the facility, for example, a guard, although inspectors may be detained for a reasonable time while the facility's attorney is reached.

Refusing entry to enforcement officers or refusing to turn over records or equipment prescribed by the warrant may be sanctioned by criminal charges. The Court may cite the facility with contempt of court for resistance or non-compliance with the judicially authorized administrative search.

CONCLUSION: Noise control enforcement procedures must comply with Fourth Amendment prohibitions on warrantless searches and seizures. Therefore, absent valid consent or clearly defined exigent circumstances, enforcement officers must obtain a warrant for searches of persons or property. Under the Barlow ruling, as well as the EPA adoption of this ruling for federal inspections under the Noise Control Act of 1972, consent or a search warrant is required for administrative searches. Although some courts

may rule that narrowly drawn statutory schemes for warrantless inspections are permissible, drafters of noise control provisons should probably include statutory language requiring consent or a warrant in all cases where entry is sought. In this way drafters can help avoid invalidation of noise control provisions on Fourth Amendment grounds.

In addition, in light of the Prouse decision which invalidates random stop spot checks of automobiles based purely on police discretion, the drafter of noise regulations should consider the requirements of probable cause, and suggest some reasonable standard upon which a spot check for noise violation will be based.

STATE AND LOCAL NOISE ENFORCEMENT LEGAL MEMORANDA

Noise and Radiation Enforcement Division
U.S. Environmental Protection Agency
Washington, D.C.

SUBJECT: Severability Clause

ISSUE: Whether or not to include a severability clause in a noise ordinance?

BRIEF ANSWER: It is advisable to include a severability clause in a noise ordinance.

DISCUSSION: To help avoid the possibility that an entire ordinance will be invalidated as the result of a successful legal challenge to one provision, drafters should include a severability clause. An example of such a clause is found in the EPA Model Noise Control Ordinance, section 11.7 which provides:

> If any provision of this ordinance is held to be unconstitutional or otherwise invalid by any court of competent jurisdiction, the remaining provisions of the ordinance shall not be invalidated.

Where there is no legislative declaration to the contrary, "the [common law] presumption is that the legislature intends an act to be effective as an entirety ... and if any provision be unconstitutional, the presumption is that the remaining provisions fall with it." Carter v. Carter Coal Co., 298 U.S. 238, 312 (1936). This presumption, in the context of a noise ordinance with diverse provisions,

could lead to the invalidation of the entire ordinance where a constitutional defect is found in a single section.

When a court does invalidate one provision of an act, the common law presumption will not necessarily operate to void an act in its entirety. A two-pronged test was articulated by the Supreme Court in Dorchy v. Kansas, 264 U.S. 286 (1924) as a guide for determining what effect the invalidation of one part of an act should have on the remaining portions. The court stated that where one part of an act is struck down, any other provision which is "inherently unobjectionable, cannot be deemed separable unless it appears both that, standing alone, legal effect can be given to it and that the legislature intended the provision to stand, in case others included in the act and held bad should fall." 264 U.S. at 290.[1]

Court evaluation of legislative intent, in fulfillment of the second prong of the Dorchy test, makes the presence of a severability clause important. The inclusion of a

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[1] For a state court application of the two-pronged Dorchy test to a statute containing a severability clause, see County of Clark v. City of Las Vegas 550 P.2d 779 (Nev. 1976).

severability clause creates a presumption of divisibility, reversing the common law presumption that the legislature intends an act to be effective only as an entirety. Williams v. Standard Oil Co., 278 U.S. 235, 242 (1929). The effect of the presumption created by a severability clause is that it becomes the burden of the proponents of inseparability to prove that the legislature intended the act to stand or fall as an entirety. As stated by the Court in Williams, the presumption clause, "must be overcome by considerations which make evident the inseparability of its provisions or the clear probability that the invalid part being eliminated the legislature would not have been satisfied with what remains." Williams at 242.

CONCLUSION: While a severability clause will serve as "an aid merely; not an inexorable command," the drafter's inclusion of such a clause, "provides a rule of construction which may sometimes aid in determining [legislative] intent." Dorchy supra at 290 (1924).

STATE AND LOCAL NOISE ENFORCEMENT LEGAL MEMORANDA

Noise and Radiation Enforcement Division
U.S. Environmental Protection Agency
Washington, D.C.

SUBJECT: Incorporation by Reference

ISSUE: May a State or local government, in enacting a noise control statute or ordinance, incorporate by reference either statutes or non-statutory information formulated by another body?

BRIEF ANSWER: Where there is no State constitutional or statutory limitation, a State or locality generally may incorporate by reference either statutory or non-statutory provisions that are presently in existence. However, if the incorporation is prospective, the provision may be held void as an unlawful delegation of legislative authority.

DISCUSSION: Drafters of State and local noise control ordinances who wish to adopt provisions identical to existing statutes or regulations may, unless constitutionally or statutorily limited, incorporate such provisions by reference to them in the new legislation. The benefits of this legislative drafting technique are the avoidance of unnecessary repetition of detail in the statute books, as well as the reduction of length of the new ordinance, and reductions in cost of publication and time required for legislative analysis in the drafting stage. See, generally, 82 C.J.S. Statutes §70 et seq. (1953).

Examples of Incorporation by Reference

A State or locality may incorporate by reference statutes and regulations which exist on the Federal level, within the State's own statutes, or provisions of other states or localities. See, e.g., Tuscon v. Stewart, 40 P.2d 72 (1935), 96 ALR 1492; Comm'n of Conservation of Department of Conservation of State v. Connor, 32 N.W.2d 907 (Mich. 1948). (Michigan legislature, in fixing fees and compensation of officers, could incorporate existing State statute provisions on this issue). Incorporation by reference has also been employed in existing noise control ordinances. For example, Portland, Oregon adopted the following ordinance to expand the scope of existing noise regulations:

> Vehicles of 10,000 lbs. GCWR (Gross Combined Weight Rating) or more, engaged in interstate commerce as permitted by Title 40, Code of Federal Regulations, Part 202, EPA, the provisions which are hereby incorporated by reference ...
>
> PORTLAND, OREGON, ORDINACE. No. 141882, §18.10.020(a)(i) (amending §16.28.290.) (1976).

A similar, more brief example is illustrated by the Madison, New Jersey ordinance:

> Article IX-A Rail Carriers Maximum Sound Levels
>
> The provisions of the United States Enviromental Protection Agency Rail Carriers Regulations promulgated January 14, 1976, Tile 40, Part 201, shall apply.
>
> MADISON, N.J. NOISE CONTROL ORD., Ch. 217 art. IX-A (1977).

Arizona has incorporated by reference provisions of its own State regulations by the following language:

> Beginning with motor vehicle and motor vehicle engines of the 1968 model year, motor vehicles and motor vehicles engines shall be equipped with emission control devices that meet the standards established by the State Board of Health.

ARIZ. REV. STAT. §28.955(c) (1967)

State legislatures may expressly authorize incorporation by reference in noise ordinances. The Connecticut Noise Pollution Act, for example, provides that the Commissioner may promulgate standards for ambient noise levels which "may include, but need not be limited to, adoption by reference of standards or regulations adopted by the Administrator of the United States Environmental Protection Agency pursuant to the Noise Control Act of 1972 or any amendment thereto."

CONN. PUB. ACTS No. 74-328, (1974).

It is a well-settled principle, however, that even in the absence of such express statutory authorization, a statute or ordinance may incorporate by reference, subject only to the State and Federal limitations discussed below. Greene v. Town of Lakeport, 239 P. 702, 704 (Calif. 1925) (Calif. ord. No. 56, fixing compensation for officers of Township of Lakeport, could incorporate fees as provided in State statutes.)

State Limitations on Incorporation by Reference

States may place constitutional and statutory limitations upon incorporation by reference. See, 82 C.J.S. Statutes

§70 et seq. (1953). Such State restraints vary in degree from total prohibition to mere imposition of procedural requirements. The New York Constitution provides, for example, that if any existing statute or portions thereof are incorporated into a new statute, the existing statutes or portions must be inserted in full in the act. N.Y. CONT. art III, §16 (1969). The Minnesota general statutes, by contrast, permit incorporation by reference if the following procedure is satisfied:

> Any city or town, however organized, may incorporate in an ordinance by reference any statute of Minnesota, any administrative rule or regulation of any department of the State of Minnesota affecting the municipality, or any code... All requirements of statutes and charters for the publication or posting of ordinances shall be satisfied in such case if the ordinance incorporating the statute, regulation, ordinance or code is published or posted in the required manner and if, prior to such posting or publication, at least one copy of the ordinance or code is marked as the official copy and filed for use and examination by the public in the office of the municipal clerk or recorder...
>
> MINN. STAT. ANN. §471.62 (West 1967)

Courts generally have strictly construed the constitutional and statutory prohibitions against incorporation by reference under the rationale that these provisions constitute limitations upon the free exercise of legislative power. See Landis Tp. v. Division of Tax Appeals of State

Dept. of Taxation and Finance, 59 A.2d 258 (N.J. 1948), (New Jersey constitutional limitation on incorporation by reference held to extend only to rights and duties imposed by existing laws and not to enforcement thereof). The drafter of State and local noise control provisions, however, should be cognizant of any State limitations and procedural requirements which exist in order to avoid invalidation of the provisions on the basis of improper incorporation by reference.

Federal Limitations on Incorporation by Reference

The United States Constitution does not explicitly prohibit incorporation by reference. However, the constitutional principle against delegation of legislative power may restict the drafter's capacity to incorporate provisions by reference. This principle is derived from the constitutional doctrine of separation of powers wherein Congress holds all legislative authority. U.S. CONST. art I, §4. The Supreme Court recognized the Constitutional limitation on Congress' power to delegate authority in Panama Refinery Co. v. Ryan, 293 U.S. 388 (1935). In that case, the Court interpreted the separation of power provisions in conjunction with Article I, section 8, paragraph 18, of the Constitution (which gives Congress the power to "make all laws which shall be necessary and proper for carrying into Execution" its general powers,) as meaning that "Congress...is not permitted to abdicate or transfer to

others, the essential legislative functions with which it is thus vested." Panama Refinery at 421.

The delegation doctrine also applies at the State level. Although there are no specific prohibitions in State constitutions against delegation of legislative authority, it is a generally accepted principle that the delegation of power by a legislative body which is invalid under the Federal Constitution is similarly invalid under State constitutions, Holgate Bros. Co. v. Bashore, 200 A. 672, 674 (1938).

Incorporation of Future Regulations

There is no improper delegation of legislative authority when the provision being incorporated by reference is already in existence. The issue of improper delegation arises, however, when future laws, rules, regulations or standards are incorporated by reference. Such incorporation may be construed as the legislature permitting other bodies to decide its laws in subsequent years. State v. Webber, 133 A. 738, 740 (1926). Legislation which has been incorporated by reference might be challenged when there is uncertainty as to whether the incorporation includes future provisions or amendments. The drafter of noise control ordinances should make clear that only regulations which are in effect at the date of the new legislation are subject to incorporation by reference.

The restrictions on incorporation by reference of future standards and regulations are particularly relevant to the drafter of noise control ordinances who wishes to utilize standards, test procedures and definitions such as those of the American National Standards Institute (ANSI). Allowing such non-governmental agencies to promulgate standards is not impermissible per se; it is only because these agencies are able to change definitional terms and standards that a question of improper delegation arises. See Colorado Polytechnic College v. Bd. for Community Colleges and Occupational Education, 476 P.2d 38, 42 (1970).

Statutes and ordinances which do not specify a given edition or publication of the code from which provisions are incorporated have been held to improperly delegate legislative authority. For example, the Supreme Court of Kansas found a provision of the Kansas Fire Prevention Act which provided that "all electrical wiring shall be in accordance with the National Electrical Code" to be an improper delegation of authority. State v. Crawford, 177 P.360, 361 (1919). The Court based its invalidation of the provision on the National Electric Association's ability to revise the code every two years. The court stated that, "If the Legislature desires to adopt a specific rule of the National Electrical Code as the law, it should copy that rule and give it a title and enacting clause and pass it through the Senate and House of Representatives by a constitutional majority." State v. Crawford at 361. Similarly,

the Washington Supreme Court held that a State statute which allowed the practice of medicine only to those who held diplomas issued by medical schools accredited and approved by the Association of American Medical Colleges, Hospitals of the American Medical Association and Council of Medical Education, and which allowed those bodies to define standards of accreditation, improperly delegated legislative authority. State v. Urquhart, 310 P.2d 261, 264 (1957). See also, Op. Atty. Gen. Minn., 59a-9, July 18, 1967; Op. Atty. Gen., 59-A-11, January 22, 1957; Op. Atty. Gen., 59-A-9, March 27, 1956. However, the Washington Supreme Court in Urquhart noted that if a specifc edition or set of standards is cited in the new legislation, no improper delegation results. Urquhart at 264.

There is some authority which supports the adoption of future codes in new legislation under the rationale that the administrative bodies merely "fill in the details" of the State legislation and as such do not engage in unconstitutional delegation of authority. Ex parte Gerino, 77 P. 166, 167 (1904) (California statute requiring applicants to practice medicine to produce diploma of medical school meeting standards prescribed by Association of American Medical Colleges does not constitute improper delegation of legislative authority). The standard employed by courts adhering to this theory was articulated in Ex parte Laswell, 36 P.2d 678, 687 (1934), in which the California Supreme

Court upheld a provision of the California Recovery Act incorporating terms of the Code of Fair Competition of the Cleaning and Dyeing Trade: "There must be an overlying law which constitutes the primary standard. The function of the delegated power must be to determine some fact, or the state of things upon which the primary, standard law depends." The court substantiated its holding by stating that the complexity and multiplicity of administrative affairs in modern legislation requires the expertise and fact-finding ability of quasi-legislative bodies which the legislature itself does not posess. Laswell at 686. Under this "filling in the details" theory, the incorporation of standards as established by the National Electrical Code definition of controlled substances, as set by the State Board of Pharmacy, and standards of accreditation for college in accordance with Regional Associations of Colleges and Secondary Schools, have been upheld by courts. See, e.g., Independent Electricians and Electrical Contractors' Association v. New Jersey Board of Examiners of Electrical Contractors, 256 A.2d 33 (1969); State v. King 257 N.W.2d 693 (1977); Colorado Polytechnic College v. State Bd. for Community Colleges and Occupational Ed., 476 P.2d 38 (1970).

The incorporation of provisions in noise control ordinances in relation to definitions and test procedures established by ANSI and other non-governmental bodies, therefore, is subject to the current disagreement of

authorities on this issue of delegation of legislative power. Many noise ordinances currently in force, as well as the NIMLO/EPA Model Community Noise Ordinance, incorporate such dynamic standards as the ANSI standards. See, EPA Model Community Noise Ordinance, sec. 3.1. Many ordinances clearly incorporate future revisions of ANSI standards. For example, the Montgomery County, Maryland noise control ordinance provides:

> ...[T]he Director may approve for use any meter conforming at least to the requirements for Type II sound level meters, as defined by ANSI SI. 4-1971 or the latest revisions thereof, using the A- weighting network.

MONTGOMERY COUNTY, MD., CODE Ch 31B-7(a) (1972)

The Fairfax County, Virginia noise ordinance provides a similar example of incorporation of future standards in it definition of octave band analyzer:

> An instrument to measure the octave band composition of a sound by means of a bandpass filter. It shall meet the specifications of the American National Standards Institute publications Sl. 4-1961, Sl.6-1967 and Sl.11-1966 or their successor publications.

FAIRFAX COUNTY CODE, Art II, Sec 16A.2.1(i) (1976)

Chicago's noise control ordinance provides an example in which a specific edition of an ANSI standard for a property line measurement test is incorporated:

> Test procedures to determine whether maximum noise levels emitted by property uses along property lines and zoning district boundaries meet the noise limits stated in sections 17-4.12, 17-4.13 and 17-4.14 of this chapter shall be in substantial conformity with ANSI Standard SI.4-1961...and further standards as may be propounded in the Code of Recommended Practices of the Dept. of Environmental Control.
>
> CHICAGO, ILL. ORD., §17-4.27 (1971).

It would appear that drafters of noise control ordinances may cite specific, existing ANSI provisions without risking a challenge of improper delegation of authority. It is only when State or local ordinance drafters incorporate future ANSI modifications of standards and definitional terms that danger of invalidation due to improper delegation arises. If challenged, these provisions are subject to the current division of the courts concerning their validity: they may be upheld as merely granting ANSI and similar non-governmental agencies the authority to determine facts or fill in details, or they may be struck down as improper delegation of legislative authority.

CONCLUSION: A State or locality may adopt regulations and statutes by incorporating them by reference where no state constitutional or statutory limitations exist. It is a well-established principle that incorporation by reference is permissible when the provisions adopted are clearly in existence at the time of the incorporation into the new legislation. The courts are divided over the issue

of whether the use of standarized procedures, regulations and definitional terms as determined by a non-legislative body, and which may change in the future, constitutes unconstitutional delegation of legislative authority and thus is invalid. Drafters of noise control ordinances can help avoid delegation challenges by expressly stating the scope and edition of the incorporated provisions.

DRAFT
4/21/80

STATE AND LOCAL NOISE ENFORCEMENT LEGAL MEMORANDA

Noise and Radiation Enforcement Division
U.S. Environmental Protection Agency
Washington, D.C.

SUBJECT: Fifth Amendment - Due Process Vagueness

ISSUE: Whether noise control provisions, such as those prohibiting "loud", "excessive" or "unreasonable" noise, are unconstitutionally vague under the Fifth Amendment?

BRIEF ANSWER: Case law is divided concerning whether qualitative noise provisions violate the due process clause of the Fifth Amendment. Provisions are generally upheld as constitutional if the terms used to define violations are within common knowledge and usage. To help minimize the number of successful challenges of unconstitutionality drafters of noise provisions should define qualitative standards as precisely as possible, or use quantitative measures to define noise violations.

DISCUSSION: Many State and local agencies have adopted quantitative standards to define noise violations. Some common types of quantitative noise regulations include product performance standards; operational limitations such as curfews; traffic limitations in sensitive noise areas; and property line limitations. These noise control provisions usually prescribe maximum permissible decibel levels for a given area or for specific noise sources.*

*For example:

> If the sound emanates from sources located within a commercial or industrial zone, the maximum permissible sound level is:
> (a) 62 dB(A) at any point on the property line
> (b) 55 dB(A) at any point on a boundary separating a commercial zone or industrial zone from a residential zone.
> MONTGOMERY, ALA., CODE Section 31(B)(1973).

Many State and local governments, however, use qualitative standards which define noise violations in descriptive rather than numerical terms. For example,

> It shall be unlawful to knowingly and wilfully cause or create excessive or unnecessary noise by engaging in boisterous, noisy and loud conduct while on a public street...
>
> WEST PALM BEACH, FLA., CODE, ch 32 A, Section A-8 (1975)

Use of such subjective provisions may raise challenges of unconstitutional vagueness. Disincentives against the use of vague terms in regulations are found in two provisions of the U.S. Constitution: the First Amendment protection of the freedom of speech; and the Fifth Amendment guarantee of due process of law.

The manner in which vagueness may infringe on free speech is described more fully in a separate memorandum but is noted here briefly INFRA p. 74. In a number of cases, courts have held noise control provisons using subjective standards to be in conflict with the First Amendment. For example, a provision prohibiting "noise from being made on the public way as to be distinctly or loudly audible" was held to be unconstitutional as constituting a prior restraint on the First Amendment freedom of speech. United States Labor Party v. Rochford, 416 F.Supp. 204 (N.D. Ill. 1975). The court ruled that the standard was too vague because enforcement depended upon such subjective criteria

as the officer's hearing acuity, frame of mind, or opinion on the merits of speech, none of which are valid criteria. U.S. Labor Party at 207. Qualitative noise provisions may similarly be subject to constitutional challenges under the Fifth Amendment.

The Fifth Amendment provides that no person shall "be deprived of life, liberty, or property, without due process of law." U.S. CONST., amend V. By interpretation, the Fifth Amendment due process clause requires that laws be sufficiently definite to put a reasonable person on notice of what conduct constitutes a violation of a given statute. Herndon v. Lowry, 301 U.S. 242 (1937). Because the Fifth Amendment protection has been extended to the state level through the Fourteenth Amendment, State and local governments must comply with the Fifth Amendment due process requirements in drafting and enforcing noise control regulations.

In Grayned v. City of Rockford, 408 U.S. 104 (1972) the Supreme Court considered the following provision of the Rockford, Illinois noise ordinance:

> No person, while on public or private grounds adjacent to any building in which a school or any class thereof is in session, shall willfully make or assist in the making of any noise or diversion which disturbs or tends to disturb the peace or good order of such school session or class thereof.
>
> Grayned at 108.

Denying claims that this provision should be disallowed on the basis of the First or Fifth Amendments, the Court cited three reasons for the Fifth Amendment requirement that laws

be sufficiently precise:

> Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminary enforcement is to be prevented, laws must provide explicit standards for those who apply them. Third, where a vague statute abut[s] upon sensitive areas of basic First Amendment fredoms, it operates to inhibit the exercise of [those] freedoms. Grayned at 108, 109.

On the other hand, the following provision of the Muskegon, Michigan noise ordinance in United Pentecostal v. Steendam, 214 N.W.2d 866, 868 (Mich. App. 1974), was held unconstitutionally vague.

> It shall be unlawful for any person to make, continue, or cause to be made or continued any noise which either annoys, disturbs, injures or endangers the comfort, repose, health, peace or safety of others, within the limits of the city.

The Michigan Court of Appeals stated that the danger of such vague language was the apparently unlimited discretionary power involved in identifying persons who were violating the ordinance. In considering the constitutionality of the ordinance, however, the court recognized the importance of noise control provisions:

> In finding that the...anti-noise ordinance is unconstitutionally vague, this Court does not condone interference with the peace and sanctity of one's home by loud noise. This admonition applies to constitutionally protected activities as well as those unprotected. We are

> persuaded that a more clearly and narrrowly drawn ordinance can achieve the municipality's objectives while insuring an ascertainable standard of guilt for due process requirements.
>
> United Pentecostal at 868.

In a recent case involving due process challenges to noise control provisions, Reeves v. City of Houston, No. H-78-961 (S.D.Tex. Aug. 1, 1978) a U.S. District Court ruled that a Houston ordinance which stated:

> The volume of sound amplified shall be controlled so that it is not unreasonably loud, raucous, jarring, disturbing or a nuisance to persons within the area of audibility.
>
> Houston, Tex., Code §29-6(b)(6) (1978)

was unconstitutionally vague under the Fourteenth Amendment. Relying on the standards of Grayned and United Pentecostal Church v. Steendom, the court concluded that:

> ... the terms "unreasonably" and "nuisance" are too imprecise and thus fail to give fair notice to those potentially subject to the Ordinance, allow government officials to engage in arbitrary and discriminatory enforcement, and create an inexact standard for administrative or judicial review"
>
> Reeves at 8.

On the other hand, similar noise control ordinance provisions have been held constitutionally valid under the Fifth Amendment. For example, a California Court of Appeals

held that a provision of the California Vehicle Code which provides that motor vehicles:

> ...shall at all times be equipped with an adequate muffler in constant operation and properly maintained to prevent any excessive or unusual noise ....

met Fifth Amendment due process requirements. Smith v. Peterson, 280 P.2d 522, 523 (Cal. App. 1955). The court gave strong deference to the legislative function by stating that "statutes must be upheld unless their unconstitutionality clearly, positively and unmistakably appears". Smith at 525. The court explained that muffler requirements similar to that contained in the California Vehicle Code can be practically enforced because "mufflers [have become] so uniformly used to minimize the noise from their exhaust that what is usual has become a matter of common knowledge, and anything in excess of that is excessive and unusual, and usually capable of ascertainment as such." Smith at 527. Here also the California court described the "common usage" test as follows:

> It is not required that a statute... have that degree of exactness which inheres in a mathematical theorum... The requirement of reasonable certainty does not preclude the use of ordinary terms to express ideas which find adequate interpretation in common usage and understanding.
>
> Smith at 525.

In Dayton v. Zollar, 122 N.E.2d 28 (Ohio 1954) a similar provision in the Dayton, Ohio motor vehicle code withstood

a challenge of vagueness and denial of Fifth Amendment due process. The Dayton motor vehicle regulation provided that "it shall be unlawful for any person to make a loud, unnecessary or unusual noise. Among those sources found to produce "loud", "disturbing noises", were exhusts, defined as:

> the discharge into open air of exhaust of any... motor vehicle except through a muffler or any other device which will effectively prevent loud or explosive noises therefrom. Dayton at 29.

The Ohio Court of Appeals concluded that this provision was framed with "sufficient specificity" to avoid a charge of unconstitutionality on the ground of vagueness and uncertainity. Dayton at 30.

CONCLUSION

There is little uniformity among courts concerning the constitutionality of qualitative noise provisions under the Fifth Amendment. Similar provisions, using such terms as "excessive" or "unnecessary" noise have been both upheld and invalidated by different courts. However, a number of themes have developed in these cases. First, mathematical exactness is not necessary; qualitative criteria, if sufficiently definite, can be constitutionally valid. Second, qualitative terms which have acquired a common usage and understanding may be permissible under the Fifth Amendment. The meaning of the term, therefore, acquires a special understanding in relation to the particular noise source which is being regulated. For example, "excessive"

motorcycle noise and "unusually loud" noises emitted from construction equipment may come within common understanding without the use of prescribed decibel measurements. Therefore, if subjective standards are sufficiently specific, courts will generally not unduly restrict governmental bodies by requiring exact, quantitative standards in ordinances. By using qualitative standards of noise control, drafters of noise control ordinances can advoid constitutional challenges under the due process clause of the Fifth Amendment. Subjective standards which are more likely to be constitutionally impermissible, should be avoided by the drafter of noise control ordinances.

STATE AND LOCAL NOISE ENFORCEMENT LEGAL MEMORANDA

Noise and Radiation Enforcement Division
U.S. Environmental Protection Agency
Washington, D.C.

SUBJECT: First Amendment Freedom of Speech

ISSUE: Are restrictions on excessive noise and/or time and place restrictions on noise in violation of the First Amendment protection of freedom of speech?

BRIEF ANSWER: Restrictions on the use of sound amplification devices, nuisance provisions and quiet zone provisions are three areas which potentially may infringe upon the First Amendment freedom of speech. To help avoid constitutional challenges on this basis, drafters of noise control regulations should be sure that the provisions are precisely drawn, establish clear guidelines for enforcement and place restrictions on speech which are reasonable and directly related to the proper legislative intent of protecting the public welfare.

DISCUSSION:

INTRODUCTION: The First Amendment of the United States Constitution, which provides that "Congress shall make no law...abridging the freedom of speech," seeks to guarantee that all persons shall be protected from government infringement upon the right to free speech and expression. U.S. CONST. amend. I. This Constitutional prohibition has been extended to the State and local governments through the Fourteenth Amendment. Although this guarantee of free speech is not absolute, it is one of the most

fundamental and closely guarded rights under the Constitution. Cox v. Louisiana, 379 U.S. 536 (1965).

The power to regulate and control noise sources within a State or community is properly within the police power of the State and local government. Saia v. New York, 334 U.S. 558 (1948). However, in exercising this police power, State and local governments must not infringe upon First Amendment rights. In order to harmonize these potentially conflicting interests, courts balance the need for proper protection of the public interest through noise control with the need to protect the exercise of free speech.

There are a number of cases in which noise control ordinances have been found to be in conflict with the First Amendment right of free speech. This typically has arisen with provisions relating to restrictions on the use of sound amplifying equipment, general nuisance provisions and quiet zone provisions such as restrictions in hospital or school zones. Such noise control regulations may be challenged as unconstitutional on their face, or unconstitutional as applied through enforcement in a particular case. Drafters of noise control regulations should be aware of potential First Amendment infringements in drafting and enforcing these types of provisions.

Sound Amplification Devices

Noise ordinances which require permits for the use of sound amplification devices may be subject to First

Amendment challenges. For example, in Saia, a local ordinance forbade the use of sound amplification devices except with the permission of the Chief of Police. Saia, a Jehovah's Witness, obtained a permit to use sound equipment for delivering religious lectures in a public park. When the permit expired, he reapplied for a permit but was refused on the basis of complaints received by the police. When he continued to deliver his lectures, Saia was prosecuted for violating the ordinance. The Supreme Court held that the ordinance was unconstitutional on its face because it contained no standard for granting permits. The complete discretion given to the Chief of Police constituted a prior restraint on the free exercise of speech. The Court emphasized that:

> There are no standards prescribed for the exercise of his [police chief's] discretion. The statute is not narrowly drawn to regulate the hours or places of use of loud-speakers, or the volume of sound (the decibels) to which they must be adjusted... [A] more effective previous restraint is difficult to imagine... Saia at 560, 561.

Drafters of noise control regulations may help avoid invalidation of provisions on the basis of unlimited discretion constituting prior restraint on freedom of speech by outlining specific guidelines for granting or denying permit applications. This method helps assure that the content of speech is not being regulated through unfettered discretion of public officials.

A narrowly drawn statute which places reasonable restrictions on the time and place of use of sound amplification devices should survive First Amendment scrutiny. In Kovacs v. Cooper, 336 U.S. 77, 78 (1949), the Supreme Court upheld an ordinance forbidding the use of any "loud speaker or instrument which emits loud and raucous noises" on public streets. The defendant was convicted for violation of the ordinance for delivering labor-dispute speeches through an amplification device on a public street near a municipal building. The Court held that the ordinance did not violate the defendant's First Amendment rights because the ordinance restricted use on public ways only and the message could still be conveyed from other areas or by other means. The Court stated that:

> The unwilling listener is not like the passer-by who may be offered a pamphlet in the street but cannot be made to take it. In his home or on the street he is practically helpless to escape this interference with his privacy by loud speakers except through the protection of the municipality.
>
> Kovacs at 86, 87.

The application of time and place restrictions of the use of sound amplification devices must be reasonable in order to comply with the First Amendment. In United States Labor Party v. Pomerleau, 557 F.2d 410, 412 (1977), the U.S. Court of Appeals for the Fourth Circuit considered the validity of the Baltimore, Maryland noise ordinance as applied to U.S. Labor Party members who used amplifiers to

conduct political rallies on the public streets of Baltimore. The ordinance established maximum sound levels permissible in residential, commercial, and industrial zones. Each level defined a specific number of decibels at any point "on the property line of the use." The distance used to enforce the ordinance against the U.S. Labor Party varied greatly: between 4 1/2 feet to 57 feet. The Court ruled that the enforcement of the ordinance did not meet the tests established by Saia and Kovacs which require an ordinance to provide fair warning of prohibited conduct and enforcement standards to citizens. Instead, the investigators measured volume from points where they observed pedestrians or from where they expected pedestrians to be in order to enforce the ordinance. "Because a violation depends on the subjective opinion of the investigator, the speaker has no protection against arbitrary enforcement of the ordinance". Pomerleau at 412. An additional basis for the Court's reversal of the defendant's convictions was that the ordinance curtailed the amplification of expression solely because the level of decibels, as measured within a few feet of the speaker, exceeded the permissible sound level. The Court stated that "the City has no legitimate interest in banning amplified political messages which do not exceed the sounds encountered daily in the most tranquil community." Pomerleau at 413.

Drafters of noise regulations to control amplification devices, therefore, should attempt to insure that the time and place restrictions placed on the use of these devices are reasonably related to legitimate public interests and that unlimited discretion is not given to public officials.

Nuisance Provisions

Nuisance provisions and disturbing the peace provisions may violate the First Amendment freedom of speech when the subjective standards are so vague that they constitute a prior restraint on free speech. United States Labor Party v. Rochford, 416 F.Supp 204, (N.D. Ill. 1975). A provision in the Chicago noise ordinance which prohibited "any noise of any kind" from being made "upon a public way or in such close proximity to a public way as to be distinctly or loudly audible on such a public way" was struck down by the Supreme Court on the basis of being overbroad and constituting a "vague, discriminatory, and unreasonable interference with plaintiff's right to free speech." Rochford at 207, 208. The Court ruled that the standard was too vague and subjective because enforcement could depend on the enforcement officer's hearing acuteness, frame of mind, or opinion on the merits of the speech, none of which are constitutionally valid criteria.

The Supreme Court of California affirmed the position that nuisance provisions must be sufficiently clear and precise in order to be constitutionally valid in In re

Brown, 510 P.2d 1017 (1973), when it invalidated §415 of the California Penal Code which provided:

> Every person who maliciously and willfully disturbs the peace or quiet of any neighborhood or person by loud or unusual noise, or by tumultuous or offensive conduct... is guilty of a misdemeanor.
>
> In re Brown at 1019

The Court outlined the following instances in which loud and disruptive noise can be restricted: (1) when there is clear and present danger to imminent violence and (2) when the purported communication is used as a guise to disrupt lawful endeavors. Because §415 could restrict constitutionally protected speech as well as that within the categories outlined above, the court invalidated the provision. Section 415 cannot, consistent with First Amendment rights, be applied to prohibit all loud speech which disturbs others even if it was intended to do so. Brown at 1022.

To avoid invalidation on the basis of vagueness constituting a prior restraint on free speech, objective noise standards which specifically provide decibel levels can be used. Subjective regulations in the form of nuisance or disturbing the peace provisions should be narrowly drawn to reduce the chances of invalidation of the ordinance on constitutional grounds.

Quiet Zones

Quiet zone, or noise sensitive zone, provisions in noise ordinances which restrict noise sources near hospitals,

schools, nursing homes and other special institutions may raise the issue of freedom of speech. The U.S. Supreme Court has considered the constitutionality of the Rockford, Ill. noise ordinance in Grayned v. City of Rockford, 408 U.S. 104 (1972), which provides in part:

> No person, while on public or private grounds adjacent to any building in which a school or any class thereof is in session, shall willfully make or assist in the making of any noise or diversion which disturbs or tends to disturb the peace or good order of such school session or class thereof.
>
> Grayned at 108.

The Court held that the ordinance was not unconstitutionally overbroad as unduly interfering with First Amendment rights since it was limited to hours when school was in session and was restricted to deliberate disruptions of normal school activities. The Court cited three reasons for requiring that time and place restrictions on speech be sufficiently precise:

> Vague laws may trap the innocent by not providing fair warning. Second, if arbitiary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. Third, where a vague statute abut[s] upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of [those] freedoms.
>
> Grayned at 108, 109.

The Court also emphasized the need to balance the right of free speech with the right of the municipality to protect sensitive activities such as school activities.

Another example of an apparently acceptable quiet zone provision is the following section of the San Francisco Municipal Code:

> It shall be unlawful for any person to create any unnecessary, excessive or offensive noise on any street, sidewalk or public place adjacent to any school, institution of learning or church while any of the same is in use, or adjacent to any hospital at any time, provided conspicuous signs are displayed in such streets, sidewalks, or public place indicating the presence of a school, institution of learning, church or hospital.
>
> SAN FRANCISCO MUNICIPAL CODE
> ORD. No. 274-72, §2903.

CONCLUSION

Communities must consider several factors in drafting and enforcing noise control ordinances to reduce conflicts with the First Amendment freedom of speech. First, where Constitutionally protected speech is restricted, regulations must be reasonable in time, place and manner so as not to unduly limit freedom of expression. Second, noise regulations must be written clearly and carefully so that persons may be adequately aware of prohibited conduct and that law enforcement officials can objectively determine what conduct constitutes a violation. Finally, the scope of the ordinance must be drawn narrowly so as to prevent infringement upon activities which are protected by the First Amendment.

DRAFT
4/21/80

PROSECUTOR

STATE AND LOCAL NOISE ENFORCEMENT LEGAL MEMORANDA

Noise and Radiation Enforcement Division
U.S. Environmental Protection Agency
Washington, D.C.

SUBJECT: Sound Level Meter/Radar: Evidence

ISSUE: The introduction in court of sound level meter readings as evidence of a violation of a noise ordinance.

BRIEF ANSWER: The admissability of sound level meter readings may follow the historical development of the admissability of radar speedmeter readings. At least one State court has recently identified problems in this area.

DISCUSSION: During the 1940s, increasing auto speeds and resulting traffic injuries led to increased concern for enforcement of highway speed limits. This concern, along with the uncertainties of opinion testimony as to vehicle speed, led to the development and widespread use of the radar speedmeter.[1] Similarly, the continual increase of motor vehicle noise levels and the related increase of motor vehicle noise control regulations has led to the development and use of the sound level meter[2] (an electronic instrument calibrated to read sound levels directly in decibels) for motor vehicle noise enforcement.

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[1] The radar [an abbreviated form for "radio detection and ranging"] speedmeter is essentially a high frequency radio transmitter and receiver. It transmits a radio beam down the road, then picks up its reflected beam on a receiver.

[2] [The sound-level meter] has a microphone that converts a sound-pressure variation in the air into an electrical signal, an amplifier powered by a battery to raise the signal level enough to operate an indicator needle, and an attenuator to adjust the signal level within the range of the meter's scale. Raymond D. Berendt, et al., Quieting: A Practical Guide to Noise Control (Washington, D.C. 1976). At 3.

The sound-level meter used in noise enforcement is similar to the radar speedmeter used in speed limit enforcement. Therefore, a look at the historical development of radar speedmeter readings as admissible evidence in court may prove helpful in predicting the development of case law involving the use of sound-level meter readings as evidence.

INTRODUCTION OF RADAR IN COURT: Radar appeared in the courtroom as a means of traffic speed-limit enforcement when State v. Moffitt, 100 A.2d 778 (1953), was brought before the Delaware Superior Court. In this case, two highway patrolmen offered into evidence electronic radar speedmeter readings to prove the speed of the defendant's car. According to the meter reading, the defendant was driving 63 miles per hour in a 50 mile-per-hour zone. The defendant objected on two grounds to the State's attempt to introduce the speedmeter reading into evidence: (1) the speedmeter had never been recognized as being a reliable instrument to record speed of vehicles on the highway, and (2) even if admitted, the speedmeter reading should not be held to constitute conclusive evidence of the defendant's speed. Moffitt at 779.

In Moffitt, the State produced an expert witness who testified as to the construction, operation and purpose, margin of error if properly functioning, and the ways and means of testing the accuracy of the speedmeter. Based on this testimony, and on the fact that the meter was the same radar unit used to determine the speed of the defendant's

car, the radar speedmeter evidence was admitted into evidence subject to the jury's determination as to its accuracy in measuring the speed of the defendant's car. The court gave the following instructions to the jury:

> The mere fact that the test in the present case was made by a person not skilled in electronics is not of sufficient import to render the Speed Meter inadmissible in evidence ...
>
> In the present case, however, before you can return a verdict of guilty under this contention - that is, a finding by reason only of the Speed Meter - you must be satisfied beyond a reasonably [sic] doubt that the Speed Meter used in the present case was functioning properly, was properly operated at the time, and was in fact an accurate recorder of speed; further, that its accuracy had been properly tested within a reasonable time from the date of its use, January 6th, 1953. Moffitt at 779.

In a subsequent case, a court in Monroe County, New York, stated that evidence resulting from a radar speedmeter would not be admitted unless an expert witness also testified. People v. Torpey, 128 N.Y.S.2d 864 (1953). The court stated:

> No expert testimony was offered on the part of the People to establish the fact that the so-called radar equipment is a mechanism that correctly and accurately records the speed of passing automobiles. The use of radar is comparatively new as a means of bringing about the arrest of violators of ordinances pertaining to the speed of automobiles and until such time as the courts recognize radar equipment as a method of accurately measuring the speed of automobiles in those cases in which the People rely solely upon the speed indicator of the radar equipment, it will be necessary to establish by expert testimony the accuracy of radar for the purpose of measuring speed. Torpey at 866.

Courts in later cases began to hold that expert testimony was not essential to an excessive-speed conviction based upon a radar reading. The expert testimony of Dr. John M. Kopper, a research scientist in the Radiation Laboratory at Johns Hopkins University, was used in New Jersey v. Dantonio, 31, 105 A.2d 918; aff'd, 115 A.2d 35 (1954). However, the court in Dantonio stated that radar speedmeter readings were admissible evidence upon a showing that the speedmeter was properly set up and tested by the police officers, without any need for the independent expert testimony of an electrical engineer as to its general nature and trustworthiness. See also People v. Sachs, 147 N.Y.S.2d 801 (1955). Advice to enforcers of noise control ordinances today should suggest that this is still good law, as applied to radar speedmeter readings.

In People v. Nasella, 155 N.Y.S.2d 463 (1956), a motorist had been charged with driving 48 miles per hour in a 40 mile-per-hour speed zone. The defendant was issued a citation on the basis of a radar "clocking," but the defendant attacked the basic accuracy of radar, contending that to receive it as a true and proven instrument for determining speed would establish its recording as conclusive proof, thus precluding any possible defense to the speeding charge.

Dr. Kopper (see Dantonio above) was called as the expert witness for the State in Nasella. Dr. Kopper's testimony emphasized the effectiveness and the competence of radar in clocking speed. The court upheld the State's

charges against the defendant and stated that the People had proved a prima facie case and a case beyond a reasonable doubt. 155 N.Y.S. 2d at 473. Speaking for the court the City Magistrate stated:

> Despite the stringency of the rule, it seems to me that it is timely to take judicial notice of the dependable character and operation of radar in detecting and recording the speed of motor vehicles, and thereby to relieve the People of the burden of adducing expert testimony. Nasella at 471

Today, most jurisdictions seem to have followed the New York and New Jersey precedent and have taken judicial notice that radar is a reliable device for measuring speed of a moving vehicle. Thus, the courts no longer require expert testimony in each case as to the nature, function, or scientific principles underlying radar. See Dietz v. State, 75 N.W.2d 95 (1956).

However, in Florida v. Aquilera, ____ Fla. Supp.____ (1979); No. 711-1015 (County Court Traffic Division, Dade County, Florida, May 7, 1979); 25 Cr. L. 2189 (1979), the court decided that based on the radar equipment now being utilized by the police in Florida and the inadequate training programs for operators of the equipment, the reliability of radar could not be accepted beyond a reasonable doubt in these cases. In other words the reliability of radar equipment would no longer be assumed.

The court held that the equipment can and should be improved to the extent that an accurate identification of

the target vehicle can be readily made under any conditions. Training methods for operators of the equipment should also be improved by requiring an intensive course of study in both the classroom and the field and by requiring a written examination for proof of the operator's qualifications. This exam should be conducted by an independent, highly skilled radar operator rather than by a manufacturing agent or his students.

The court, however, did not hold that the scientific principles underlying the use of radar are faulty. It merely held, that, before the reliability of radar will be accepted beyond a reasonable doubt the manufacturers of the equipment and the State and local governmental entities in Florida should work together to improve both the equipment and the competency and qualifications of the operators of the radar equipment.

This case has, at best, limited precedential value. The decision was based on radar speed measuring equipment and operator training methods utilized by the State of Florida and should therefore be restricted to Florida as requiring an improvement in these areas in that State. Other State courts should not use this decision as a precedent in their decisions without first examining the equipment and operator training methods beging utilized in their particular State. Most courts still take judicial notice of the general accuracy of radar speed measuring devices provided that it is proved that the particular speed meter is accurate, that

the operator was qualified and that the device was being properly operated in the case being tried. See, State v. Reading, 389 A.2d 512, (1978).

ESTABLISHED REQUIREMENTS FOR ADMISSIBILITY OF RADAR: The accuracy of each radar device remains a factor which must be proven by the prosecution. Admissibility of radar readings is conditioned on a prima facie showing that the radar set was functioning properly at the time of the alleged excessive speed reading. The prosecutor must show that the radar was tested for accuracy, that the testing device was properly calibrated or checked, and that the test of the radar was made proximate to the time and place of traffic observations. St. Louis v. Boecker, 370 S.W.2d 731 (Mo. App. 1963).

There are three basic methods of testing radar equipment accuracy which have been presented to the courts: (1) internal tests, (2) tuning fork tests, and (3) "run through" (road tests) using a vehicle with a calibrated speedometer.

Internal tests are usually conducted by electronic experts with specialized equipment and procedures to test the crystal detector, the cavity output, the frequency calibration, and the indicator calibration. The State of New York offered into evidence internal test results in establishing its case against a speeding driver in People v. Charles, 180 N.Y.S.2d 635 (1958). . However, the evidence in this case was rejected. The Court in Charles held that the

test of accuracy must take place at the time the equipment is being used. This type of test is not used very frequently.

A second type of radar accuracy test which has been presented in court is the tuning fork test. Tuning forks are calibrated for most speeds from 15 mph to 100 mph in multiples of 5 mph. If a 60 mph fork is struck and placed in front of the radar transmitter receiver, the reading should be 60 mph on the meter scale of the instrument being tested.

The run-through test, a third type of accuracy test, involves running a vehicle with a calibrated speedometer through "the trap" (influence zone) and comparing the speedometer reading with the reading on the radar meter. If the readings are the same with a plus or minus 1-2 miles-per-hour tolerance, the meter is deemed to be accurate. Nasella, at 464.

Evidence of the tuning fork test and the run-through test are usually offered together to prove speed violations.

The Appellate Division of the Circuit Court of Connecticut has held that the testimony of a police officer that he tested the radar device in question with tuning forks and that he also ran a test car through the zone of influence, was sufficient foundation for admitting the radar graph showing the defendant's excessive speed. State v. Lenzen, 189 A.2d 405 (1962). In the same jurisdiction, the court held that the evidence of the accuracy test was sufficient where a test was made with 40 and 60 mph tuning

forks but without the 80 mph tuning fork and without a run through test. State v. Carta, 194 A.2d 544 (1962). In another case, however, a Missouri Court reversed a conviction where the police officer testified that a tuning fork test was the only test made on the radar unit and the accuracy of the tuning fork used was not presented. St. Louis v. Boecker, supra. The court in Boecker, also noted that the tuning fork test was not made at the site of the defendant's alleged offense nor was a "run-through" test made with another vehicle going at a known speed.

The Springfield, Missouri, Court of Appeals noted that the speedometer of an automobile is only "approximate" in its accuracy and that some control is necessary to insure reliability. State v. Graham, 322 S.W.2d 188, 197 (Mo. Ct. App. 1959). The State in this case did not establish that the speedometer of the patrol car used in the run-through had been checked. However, the conviction was upheld because it was later shown that the highway patrolman had confirmed the run-through check with a tuning fork test.

To the contrary, a Court in Montgomery County, New York, held that a test of the radar equipment for accuracy by a vehicle's speedometer which itself had not been tested or, if tested, with no proof of such test, did not qualify as evidence of the accuracy of radar equipment. However, this court held that the run-through test was admissible evidence but was not sufficient without additional evidence to sustain a conviction. The court added that the additional

evidence requirement could have been satisfied if a tuning fork test had been done and if such results had been presented to the court. People v. Johnson, 196 N.Y.S. 2d 227 (1960).

It has also been held that the testimony of "qualified observers", would meet the additional proof requirement. People v. Fletcher, 216 N.Y.S.2d 34 (1961). Yet, the court in Wilson v. State, 328 S.W.2d 311 (Tex. 1959), reversed a conviction for speeding where a police officer testified that the radar unit clocked excessive speed readings and that he had driven a vehicle through the zone of influence at 60 mph as a test. However, the police officer offered no evidence as to the accuracy of the radar during the test. The court in this case said that the burden of proof was on the police to show the accuracy of the radar equipment at the scene and this the police had failed to do.

NOTICE: A number of jurisdictions also require that readily visible signs be posted when radar is in use. For example, in State v. Wibelt, 223 N.E.2d. 834 (Ohio 1967), the court refused to uphold a speeding conviction of a motorist against whom radar evidence had been offered because the roadway signs warning "Speed Meter Ahead" were not illuminated or reflectorized and there was no proof that the speed limit sign was reflectorized. See also Commonwealth v. Brose, 194 A2d. 322 (Pa. 1963) for a similar result.

According to Royals v. Commonwealth, 96 S.E.2d. 812 (Va. 1957), one legislative purpose of this requirement is to give fair warning that the law is being enforced with

radar devices and thus to help avoid the success of the entrapment defense.

ADDITIONAL DEFENSES: Entrapment, unconstitutionality and apprehension of the wrong person have been asserted as defenses to speeding charges based upon radar speedmeter readings.

One defense sometimes asserted against the use of a radar speedmeter to catch speeding violators is that it constitutes a "speed trap" and thus, is an entrapment. A Washington State Court in State v. Ryan, 293 P.2d 399 (Wash. 1956) held that the use of radar did not constitute a speed trap since it did not involve timing of a vehicle while traveling through a measured section of highway. In a similar case, a California district court has held that the only type of "speed trap" prohibited by California statute is one combining four characteristics: (1) a particular section of the highway; (2) measured as to distance; (3) with boundaries marked, designated or otherwise determined; and (4) the speed of the vehicle determined by computing the time it takes the vehicle to travel a known distance. Since the facts in this case did not include these four characteristics, the court concluded no "speed trap". in re Beamer, 283 P.2d 356 (Cal. 1955).

The defense of unconstitutionality was asserted by the defendant (driver) in Dooley v. Commonwealth, 92 S.E.2d 348 (Va. 1956). The statute under which the defendant was prosecuted provided that the speed of motor vehicles may be checked by the use of radio microwaves and other electrical

devices (including radar). The defendant contended that this statute as enforced violated his rights under the Due Process Clause of the Fourteenth Amendment. The Virginia Supreme Court of Appeals accepted the radar results as prima facie evidence of the speed of defendant's motor vehicle and concluded that the statute did not contravene the Due Process Clause of the Fourteenth Amendment as follows:

> Defendant's contention that the Act contravenes the due process clause of the Constitution is, ... without merit. The general rule is that the test of the constitutionality of statutes making proof of a certain fact prima facie or presumptive evidence of another fact is whether there is a natural and rational evidentiary relation between the fact proven and the fact presumed. Where such evidentiary relation exists and where the presumption is found to be both reasonable and rebuttable it does not violate the due process amendment....
>
> That there is a natural and rational evidentiary relation existing between the results of a speed checked by radiomicrowaves and the speed of the motor vehicle checked by them can hardly be denied. For many years the public has become generally aware of the widespread use of radiomicro waves or other electrical devices in detecting the speed of motor vehicles or other moving objects; and while the intricacies of such devices may not be fully understood their general accuracy and effectiveness are not seriously questioned. State v. Dantonio, 115 A.2d 35, 39, 40.
>
> Neither does the statute, as contended by the defendant, shift the burden of proof. It merely creates a rule of evidence and does not determine the guilt of the accused. When the radiomicrowave check of the speed of a motor vehicle is proved to be in excess of the legal rate of speed the burden of

> going forward with the evidence shifts to the defendant. This neither shifts the burden of ultimate proof nor does it deprive the defendant of the presumption of innocence. Barton v. Camden, 137 S.E. 465...
>
> For the reasons stated, we hold that §46-215.2, Acts of Assembly 1954, Chapter 313, page 385, does not violate the Fourteenth Amendment to the Constitution of the United States, and that it is in all respects a valid enactment. Dooley at 349-350.

A third defense to a speeding charge is that the wrong car was stopped. This argument might be used effectively where traffic was heavy at the time and more than one vehicle was in the "zone of influence" of the radar at the time the defendant's vehicle was being clocked. One potentially effective method of rebutting this argument is the testimony of a well-trained, capable law enforcement officer. 11 Am. Jur. Proof of Facts §23 (Supp. 1977). The defendant in Commonwealth v. Bartley, 191 A.2d 673 (Pa. 1963) contended that since his car was in a line of five cars each 200 to 300 feet apart, the officer could not be positive which vehicle caused the radar to clock the violation. A police officer testified that he knew the exact spot where the radar beam first detected the object and that he watched the defendant's car approach that spot and enter the zone of influence at which time the radar unit clocked a speeding violation. The court held that the police officer's testimony was sufficient to uphold the charge.

CONCLUSION: With the increasing use of sound level meters for the enforcement of noise standards, the question of the admissibility of mechanical meter readings as evidence in court may arise. The procedure for establishing sound level meter readings as admissible evidence may be analogized to the procedure used for radar. Therefore, a number of developments should be expected. Expert testimony as to the reliability of the sound level meter may be an initial requirement. In light of the recent Florida decision the reliability of such instruments is always a subject of proof, and therefore may not automatically be expected to be a proper subject for judicial notice. The admissibility of sound level meter readings may be conditioned on a prima facie showing that the meter was properly calibrated and functioning properly at the time of the alleged sound level reading. The prosecution should be prepared to rebut the various defense arguments, including assertions of mistake, entrapment and unconstitutionality. Modern technology appears to remain as an available aid to noise enforcement, but the burden of proof must still be met.

STATE AND LOCAL NOISE ENFORCEMENT LEGAL MEMORANDA

Noise and Radiation Enforcement Division
U.S. Environmental Protection Agency
Washington, D.C.

SUBJECT: Fifth Amendment and Self Incrimination - Involuntary Noise Test

ISSUE: Does an enforcement officer's order to an operator to rev an engine as part of a noise test constitute a denial of the operator's Fifth Amendment privilege against self-incrimination?

BRIEF ANSWER: No. The Supreme Court has interpreted the Fifth Amendment as protecting only "testimonial" or "communicative" evidence, and it is unlikely that noise test evidence would be considered "testimonial" or "communicative."

DISCUSSION: The U.S. Constitution provides in part that "... no person ... shall be compelled in any criminal case to be a witness against himself...." U.S. CONST. amend. X. The Supreme Court held the Fifth Amendment privilege to be applicable to the States through the Fourteenth Amendment. Malloy v. Hogan, 378 U.S. 1 (1964).

An operational definition of being "compelled... to be a witness against oneself" has evolved from court decisions. For example, the Supreme Court has held that it is not a denial of the privilege against self-incrimination to compel a defendant to put on a garment. Holt v. United States, 218 U.S. 245 (1910). More recently, in Schmerber v. California, 384 U.S. 757 (1966), the Supreme Court rejected

the defendant's claim that the taking, over objection, of a blood sample by a physician at police direction was a violation of the Fifth Amendement's prohibition of compulsory self-incrimination. The Court noted that "both federal and state courts have usually held that it [the privilege] offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture." Schmerber at 764. See also Adams v. State, 485 S.W. 2d 746 (Ark. 1972).

From these cases, it is apparent that compelled activities which require active participation by the defendant will not necessarily be protected by the Fifth Amendment. The test for distinguishing between the compulsions which will be deemed to evoke the Fifth Amendment privilege and those which will not appears in Schmerber at 761: "... the privilege protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature...." The Court elaborated that while the blood test evidence was clearly "an incriminating product of compulsion," it was not inadmissible on privilege grounds since it "was neither petitioner's testimony nor evidence relating to some communicative act or writing by the petitioner...." Schmerber at 765.

CONCLUSION: Case law supports a contention that the constitutional protection against compelled self incrimination does not extend to a request to operate a piece of equipment for purposes of testing it against a specific statutory standard. A motorist might be required to "rev" an engine for a noise test and have no recourse under a claim of compelled self incrimination. The critical factor in providing testimony against oneself is whther the evidence sought is communicative or testimonial.

STATE AND LOCAL NOISE ENFORCEMENT LEGAL MEMORANDA

Noise and Radiation Enforcement Division
U.S. Environmental Protection Agency
Washington, D.C.

SUBJECT: Prima Facie Evidence

ISSUE: What is the legal significance of prima facie evidence?

BRIEF ANSWER: Prima facie evidence is evidence which if not rebutted is sufficient to establish a fact.

DISCUSSION: A noise ordinance may state that a measurement of noise exceeding specified noise levels shall be deemed to be prima facie evidence of a violation of the ordinance. For example Ashland, Ohio has an ordinance which provides:

> The creation of noise by the squealing of tires, or the creation of tire marks on the roadway, shall be prima facie evidence of a violation of this section. ASHLAND, OHIO, CODIFIED ORDINANCES §333.06 (1969).

In an early Supreme Court opinion, Justice Story found that prima facie evidence of a fact "is such as, in judgment of law, is sufficient to establish the fact; and, if not rebutted remains sufficient for the purpose." Kelly v. Jackson, 31 U.S. 631 (1832). Simila definitions have been employed in numerous, more recent lower court decisions. One representative description is that prima facie evidence is:

> ... [e]vidence which, if unexplained or uncontradicted, is sufficient to sustain a judgment in favor of

> the issue which it supports, but which may be contradicted by other evidence.... State v. Haremza, 515 P.2d 1217, 1222 (Kan. 1973).

While prima facie evidence is thus consistently defined as sufficient to support a judgment on a single issue, certain usage of the term raises the question of whether a prima facie case, if unrebutted, requires a judgment in favor of the person who introduced the evidence. As Wigmore points out, the term prima facie is sometimes given the meaning that the proponent of the evidence, "has entitled himself to a ruling that the opponent should fail if he does nothing more in the way of producing evidence." 9 J. WIGMORE, EVIDENCE §2494, at 293 (3d ed. 1940). The more prevalent usage, according to Wigmore at 293-94, is that:

> [W]here the proponent, having the first duty of producing some evidence in order to pass the judge to the jury, has fulfilled that duty, satisfied the judge, and may properly claim that the jury be allowed to consider his case.

Wigmore elaborates that the significance of a prima facie case is that "the proponent is no longer liable to a non-suit or to the direction of the verdict for the opponent...." The Supreme Court of North Carolina has expressed this latter view in Clott v. Greyhound Lines, Incorporated, 180 S.E.2d 102 (N.C. 1971).

CONCLUSION: Prima facie evidence of a noise violation is evidence which may be sufficient to establish a noise

violation exists. The drafter of noise ordinances may want to consider wording such ordinances to include specific reference to mechanical measuring devices and the permissible limits beyond which violations are said to exist. In this way the drafter can further assure that a prima facie case is established when the required facts are shown to exist. However, under the more prevalent view, even if a prima facie case is unrebutted, the trier of fact will still be free to decide if there has been a violation.

STATE AND LOCAL NOISE ENFORCEMENT LEGAL MEMORANDA

Noise and Radiation Enforcement Division
U.S. Environmental Protection Agency
Washington, D.C.

SUBJECT: Sovereign Immunity

ISSUE: When may sovereign immunity bar a successful prosecution of a State or local government agency for violation of a State or local control statute or ordinance?

BRIEF ANSWER: Under the common-law doctrine of sovereign immunity, a State agency may not be prosecuted for violations of its own statutes or local regulations unless it has specifically waived its immunity through Constitutional or statutory provisions. Because the common-law doctrine of immunity exists in varying degrees in different jurisdictions, and because State constitutions, statutes and local ordinances may provide additional bases of sovereign immunity, drafters and enforcers of noise regulations must acquaint themselves with the extent to which sovereign immunity has been extended or waived in their own States.

Local governmental immunity flows from the State, thus the State may limit or extend the immmunity of its political subdivisions. In determining whether a local government may be prosecuted for violation of its own or another local noise ordinance, courts have used different tests which will be discussed following. Among them are: strict sovereign immunity, State agency theory, superior sovereign test, governmental-proprietary function and, balancing.

Although the extent of local government immunity is ultimately a judicial determination, drafters of noise control regulations may influence the judicial determination by including provisions which explicitly include or exclude local governments within the scope of the regulations. The specific provisions relating to waiver, or lack thereof, can then be used judicially to help determine the intent of the ordinance. As is the case with any new law, the prosecutor of local noise ordinances will be aided by the specificity with which any waiver of governmental immunity is designated.

DISCUSSION:

Hypothetical Situations where the Defense of Sovereign Immunity may be Raised

Because governments and their agencies are often major sources of noise, drafters and enforcers of State and local noise statutes and ordinances should consider the potential application of the defense of sovereign immunity.

Under fact situation like the following, sovereign immunity may become a legal issue in a noise enforcement action:

(a) State agency in violation of State noise statute, (e.g., a State sewage treatment plant violates the maximum permissible decibel level prescribed by the State Noise Enforcement Agency);

(b) State agency in violation of local regulation, (e.g., State construction equipment violates a municipal ordinance restricting construction project noise);

(c) Local government in violation of State noise regulation, (e.g., city-owned garbage trucks exceed permissible in-use emission levels adopted by a State);

(d) Local agency in violation of local noise regulation in the same jurisdiction, (e.g., city-owned trucks violate municipal noise ordinance);

(e) Local government in violation of local noise regulation in a different jurisdiction, (e.g., county-owned air conditioner violates a city noise ordinance).

Bases of Sovereign Immmunity

Under the common-law doctrine of sovereign immunity, States, and, to a lesser degree, local governments, are immune from suits based upon claims against them. The immunity of the sovereign is based on the historic principle that no court has the power to command the King ("the king can do no wrong"). Ulen & Co. v. Bank Gospodarstwa Krajowego, 24 N.Y.S.2d 201 (Sup. Ct. App. Div. 1940). It is an established principle of jurisprudence resting on reasons of public policy. Because of the inconvenience and danger which would flow from any different rule the "sovereign" cannot be sued in its own courts or any other without its consent. The modern trend, however, is toward the relaxation of the doctrine of governmental immunity. For example, in all States the doctrine of strict sovereign immunity has been relaxed sufficiently to allow some actions to be brought against the government. However, often such actions are

limited to claims based upon contract or tort. Because the common-law doctrine survives in some jurisdictions, noise control ordinance drafters should consider to what extent the government is subject to noise regulations. See 77 Am. Jur. United States §112 (1975).

In addition to the common law, State Constitutional provisions provide an additional source of sovereign immunity. For example, the Pennsylvania Constitution states:

> Suits may be brought against the Commonwealth in such manner, in such courts and in such cases as the Legislature may direct. Pa. CONST. art., §11

In Sweigard v. Department of Transportation, 309 A.2d 374, 375 (Pa. 1973), the Supreme Court of Pennsylvania interpreted this constitutional provision as establishing, rather than waiving, sovereign immunity for the State of Pennsylvania and its State agencies.

State statutes may also provide an additional source of sovereign immunity. For example, the Michigan general statutes provide that the State, the State Highway Department and the Chief Officer of the State Highway Department shall be immune from liability with respect to injury resulting from ice on public highways. See, Mich. Pub. Acts 1943, No. 237; 1945, No. 87; 1960, No. 33. In interpreting these general statutes, the Supreme Court of Michigan stated, "The doctrine of sovereign immunity in Michigan is not the archaic, obsolete, King can do no wrong edition of 1066...but is a creature of the Legislature." McDowell v. Mackie, 112 N.W.2d 491, 492 (Mich. 1961).

Sovereign immunity may also be established through local ordinance provisions. Such provisions may state that the State or local government is exempt from prosecution for violation of the ordinance. For example, the Grand Rapids, Michigan noise ordinance provides:

> "Provisions of this subsection shall not apply when the vehicle or motor is being used by a public utility, municipal department, commission or other governmental agency to provide essential services hereinbefore defined."
>
> GRAND RAPIDS, MICH. ORD. Ch. 151, Art 6(b)

Scope of Sovereign Immunity: State Compliance with State Regulations

A State may waive its sovereign immunity through express statutory or Constitutional provisions. 81 C.J.S. State §229 (1977). Waiver provisions have been strictly construed by courts, however, and governmental immunity remains intact outside the scope of the waiver provisions. Nevada v. Webster, 504 P.2d 13165, 1320 (1972). (Nevada statute limiting tort recovery to $2,500 strictly construed to mean ceiling on each claim rather than aggregation of claims.) Some courts have implied a waiver from general statutory language, but the majority of courts require explicit language to construe a valid waiver. Cooper S.S. Co. v. Michigan 194 F.2d 465, 467 (1952). (Michigan Court of Claims Act waiving immunity in Federal Court does not extend to maritime tort suits).

Drafters of noise statutes can include a provision which waives the government's immunity from citations for

noise violations. These provisions, however, must expressly delineate the extent of waiver intended by the drafter. For example, the New Jersey Noise Control Act of 1971 includes the State within the class of persons subject to its provisons. The definition of "person" in that statute states:

> "Person" means any corporation, company association, society, firm, partnership, and joint stock company as well as individuals, and shall also include the State and all its political subdivisions and any agencies or instrumentalities thereof. N.J.S.A. 13: 1G-1(e) (1971)

State Compliance with Local Regulations

State waivers may not necessarily constitute sufficient waiver of State immunity from enforcement of local noise ordinances. If the local regulations are identical to the State noise provisions, a court may either rule that the State waiver extends to all noise regulations, both State and local, or rule that the State did not intend to subject itself to prosecution by each locality for noise violations. If, however, a local ordinance contains restrictions more stringent than the State noise statute, a court may more likely find that the State has not consented to waive its immunity from local regulations. Enforcers of local noise regulations should review all relevant State Constitutional and statutory material to search for an effective waiver of State immunity. However, the validity and extent of these waivers are ultimately subject to judicial determination.

Local Compliance with State Regulations

A local governmental body is subject to enforcement of State statutes. 81 C.J.S. States §229 et seq. (1971). Because local governments are political subdivisions of the State, all local sovereign immunity flows from the State. However, a State may explicitly waive local government immunity by including it within the scope of State provisions. Such waivers may be made by including political subdivisions within the definition of persons subject to enforcement of the statute. For example, the Maryland noise control statute provides:

> "Person" means any individual, group or individuals, firms, partnership, association, private or municipal corporation, or political subdivision of the State...
>
> MD. ANN. CODE. art. 43, §828 (1974)

A local government may specifically state that its agencies shall comply with State noise regulations. For example, the Anchorage, Alaska noise ordinance provides:

> All municipal departments and agencies shall comply with federal and state laws and regulations and the provisions and intent of this chapter respecting the control and abatement of noise to the same extent that any person is subject of such laws and regulations.
>
> ANCHORAGE, ALASKA ORD. Ch. 15.70.040(C) (1978)

However, because all local governmental immunity is derived from the State, these provisions are more declarations of local compliance rather than self-executing waivers of sovereign immunity.

Local Compliance with Local Regulation (same jurisdiction)

A local government is more amenable to suit by its own departments and citizens than is the State. See, 62 C.J.S. However, there is no mechanical formula used by courts in determining the extent to which a municipality must follow its own ordinances and regulations. See, Sales, The Applicability of Zoning Ordinances To Governmental Land Use, 39 Texas L. Rev. 316 (1961). This study of cases dealing with the applicablity of zoning ordinances to municipal government land uses reveals trends which may be useful in predicting how courts will determine whether local governments are subject to their own noise regulations.

Some jurisdictions apply strict sovereign immunity to the local government which has enacted the ordinance. See, C.J. Kuback Co. v. McGuire, 199 Cal. 215, 248 Pac. 676 (1926). This immunity is absolute unless the State has expressly required compliance by the local government through its enabling act governing the regulation. See, 39 Tex. L. Rev. at 317 (1961). However, this position is waning expecially in light of the general trend toward dissolution of immunity at both the Federal and State level. See, 81A C.J.S. States §303. (1977).

In zoning ordinance cases, courts have widely used the "governmental-proprietary function" approach. See, Governmental Immunity From Local Zoning Ordinances, 84 Harv. L. Rev. 869 (1971). Under this test the activity performed by the government which violates the ordinance or regulation is classified either as governmental, (i.e., when the

municipality is acting pursuant to and in furtherance of obligations imposed by legislative mandate) or proprietary (i.e., if the act is permissible in nature and the municipality has the power but not the duty to perform the function). See, Rhodes v. City of Ashville, 52 S.E.2d 371, 375 (1949). If the activity is classified as governmental, there is no mandatory compliance with the ordinance. Id. at 375. If the function is classified as proprietary, the municipality must comply with the ordinance. Id. at 375. Although the classifications are reasonably distinct, no satisfactory basis for determining whether an activity falls within one class or the other has developed: the same activity has been classified as governmental in one jurisdiction and proprietary in another. 84 Harv. L. Rev. 869 at 872. For example, New York courts have classified sewage disposal as governmental while Alabama courts have classified it as proprietary. Garbage disposal facilities and water supply facilities have been classified as both governmental and proprietary in different jurisdictions. Further, the same function may be classified differently depending upon the type of action involved. For example, an Alabama court has classified sewage treatment facilities as proprietary in zoning actions yet a governmental function in tort actions.[1]

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[1] Compare Westchester v. Village of Mamaroneck, 255 N.Y.S.2d 290 (1964) aff'd 16 N.Y.S.2d 940 (sewage treatment: governmental) with Jefferson County v. City of Birmingham, 55 So.2d 196, (1951) (sewage treatment: proprietary). Compare Pruett v. Dayton, 168 A.2d 543 (1961) (garbage: governmental) with O'Brien v. Township of Greenburgh, 268 N.Y.S. 173 (1933) aff'd 195 N.E. 210 (garbage: proprietary) and McKinney v. City of High Point, 73 S.E.2d 440 (1953) (water supply: governmental) with Water Works Bd. v. Stephens, 78 So.2d 267 (1955) (water: proprietary). See, also, Jefferson County v. City of Birmingham, 55 So.2d 196,

Drafters of noise control regulations may expressly state that the government is subject to the noise control provisions to help avoid a judicial determination that governmental immunity exists by virtue of the governmental-propriety function test. Following are examples of provisions of noise ordinances which clarify the scope of the immunity of the local government from its own noise provisions:

> The provisions of this ordinance shall not apply to governmental agencies when engaged in activities authorized by law; or emergency work performed for the safety, welfare and public health of the citizens.
>
> CITY OF KALAMAZOO, MICH. ORD. No. 992

> Person: Any individual, association, partnership or corporation and includes any officer, employee, department, agency or instrumentality of a State or any political subdivision of a State.
>
> FOND LU DAC, WIS. ORD. §17.03 (1976)

Local Compliance with Local Regulation (different jurisdiction)

A complex case of sovereign immunity arises when there is conflict between two political subdivisions of the State, e.g., a municipality and a county or a municipality and a school district. Courts have used various approaches to determine the extent to which one locality is subject to ordinances of another locality. See generally, Sales, The Applicability of Zoning Ordinances to Governmental Land Use, 39 Texas L. Rev. 316 (1961); Governmental Immunity From Local Zoning Ordinances, 84 Harv. L. Rev. 869 (1971).

The governmental-proprietary function approach is most prevalent among jurisdictions today. See, 39 Texas L. Rev. at 320. The same test used by some courts to determine whether a local government is immune from prosecution for violations of its own ordinances. However, jurisdictions differ concerning the classification as either governmental or proprietary functions frequently performed by local government agencies.

The "State agency" approach used by some courts holds that a county or other political subdivision is not subject to municipal ordinances because it is acting as an arm of the State and is thus protected by the State's sovereign immunity. See, Hall v. City of Taft, 302 P.2d 574, 576 (Cal. 1956). Concluding that a school district was not subject to a municipal zoning ordinance, the California Supreme Court stated, "when it [school district] engages in such sovereign activities as construction and maintenance, it is not subject to local regulation unless the Constitution says it is or the Legislature has consented to such regulations." Id. at 379. One criticism of this approach is that the municipality, in enacting and enforcing a local noise provision, is also engaged in local performance of a State function pursuant to State enabling legis ation. See generally, 39 Texas L. Rev. 316 (1961). Strict application of this test would result in immunity of political subdivisions from local noise ordinances.

The "superior sovereign" approach compares the respective levels of the local jurisdictions or agencies which are violating or attempting to enforce an ordinance. In ruling that a county was not subject to a municipal zoning regulation, a New Jersey court stated:

> Where the immunity from the local zoning regulations is claimed by an agency or authority which occupies a superior position in the governmental hierarchy, the presumption is that such immunity was intended in the absence of express statutory language to the contrary. However, the higher authority should make attempts to comply with the local authority. Tim v. City of Long Branch, 53 A.2d 164, 165 (N.J. 1947).

Under this approach, political subdivisions of the State are immune from noise ordinances enacted by "lower-level" governmental bodies.

The "balancing approach", adopted by some courts, compares the activity causing the violation with the function of enforcing the local ordinance. See Comment, The Inapplicability of Municipal Zoning Ordinances To Governmental Land Uses, 19 Syracuse L. Rev. 698 (1968). Factors considered in these balancing tests are: specific statutory authority granted to the violating governmental body to perform the function, the scope and specificity of this statutory authority, and whether a direct conflict exists between the functions. For example, the New York Supreme Court has held that if there is specific statutory authority for a governmental unit to perform a function, this supercedes a town or local ordinance. Bishoff v. Town of East Hampton, 263 N.Y.S.2d 61, 63 (S.Ct. 1965).

The New Jersey Supreme Court has applied a "reasonableness of political unit's actions" standard in questioning whether the political unit's action was arbitrary, and then comparing the utility of enforcing the local ordinance. Township of Washington v. Village of Ridgewood, 141 A.2d 308, 311 (N.J. 1958). Courts which use the balancing approach often incorporate the governmental-proprietary function, State agency and superior sovereign tests as factors in weighing the utility of the violating function with the enforcement of the ordinance.

An additional factor often considered in the context of balancing is whether the violating activity constitutes a common-law nuisance. For example, in ruling that the location of a county jail was not bound by municipal zoning requirements, a Wisconsin court stated, "unless a different intention is clearly manifested, States, municipalities, the Federal Government and other political subdivisions are not bound to requirements of a local ordinance, especially where the proposed uses are not within the nuisance classification." Green County v. City of Monroe, 87 N.W.2d 827, 828 (Wis. 1958). Similarly, an Alabama Court has held that although a municipal ordinance alone was insufficient to prevent a county from building a structure, the ordinance may be used as evidence to enjoin construction in a nuisance suit. Lauderdale County Bd. of Ed. v. Alexander, 110 So.2d 911, 912 (Ala. 1959).

Although provisions within the codes of individual localities, subjecting other local governmental units to the ordinance are not dispositive in subjecting other governmental units to noise control provisions, where there has been no waiver of sovereign immunity by the State or the violating governmental body, or where the court uses a strict superior sovereign test, these provisions may have persuasive values for the locality enacting the noise ordinance. Such provisions may effect the court's classification of the violating functions as governmental or proprietary as well as the balancing of the violating activity with the ordinance enforcement, especially in courts which mandate compliance with ordinances when the activity constitutes a nuisance.

CONCLUSION

Because State agencies are protected against prosecution for violation of noise regulations unless the State has explicitly waived its immunity, drafters and enforcers of State and local noise regulations should view all relevant State Constitutional and statutory provisions to determine if a valid waiver of State sovereign immunity exists.

Local government immunity from noise provisions which it has enacted differs in individual jurisdictions. Because government compliance with noise regulations may depend upon a court classification of a given activity as governmental or proprietary, a test for which no clear guidelines have been established, the ordinance draftsman

should expressly state whether government facilities and functions are immune from the noise provisions or are subject to enforcement. In this way the intent of the locality to include or exclude the government from the ordinance provisions is clear.

The ability of one political subdivision of a state to subject another political subdivision of a state to local laws is ultimately subject to judicial determination. Although provisions in local ordinances which include other governmental units within their scope are not conclusive in insuring enforcement, such provisions may assist the court in balancing the function of the activity causing the violation, with the function of enforcing the ordinance, and thus serve as persuasive value to allow the court to uphold a local noise ordinance.

For Section III A, PROSECUTOR.

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